Central Law Journal.

ST. LOUIS, MO., MARCH 14, 1902.

WHAT CHARACTER OF ADVERTISING CONSTITUTES A BREACH OF LEGAL ETHICS.—The *Kansas City Bar Monthly* informs us of an ordinance recently introduced into the Kansas City Council to require what they term "snitches" to pay a license of five hundred dollars per year. By a "snitch" is meant one who for a consideration offers his services to attorneys to bring them business, generally of the damage suit kind. Our contemporary takes a very pessimistic view of the proposed ordinance: "We do not wish to point out to the 'snitches' and the lawyers employing them how this ordinance may be evaded, but we do not think this ordinance will put the 'snitch' out of business. He has only to be admitted to the bar and then claim that soliciting damage suits is an incident to the practice of the law, as, in fact, it has become with too many lawyers." This discouraging reflection naturally leads to a more dismal conclusion: "With the practice of law as it is conducted in an office well equipped with runners and bicyclists, it seems to be only a question of time when the practice of the law will become a necessary evil which the state may be called not only to mitigate but to wholly suppress. The public certainly needs to be protected from such lawyers." While we deplore as deeply as our contemporary the practice of employing "runners" and "snitches," we do not share its gloomy forebodings for the future. A profession which dates its birth from the dawn of civilization and does not expect to die until man returns again to the savage, is not worried over the presence of a few parasites in its midst. The "snitches' and "runners" will continue their nefarious practice until the millenium, and the only severe punishment that can ever be expected to deter them is the supreme contempt of the profession itself.

The consideration of this subject naturally leads to the question how far the ethics of the profession permit the employment of advertising methods to make known the lawyer to his friends, acquaintances, and the public in general. This is an exceedingly delicate question which we prefer as a general rule to leave to the lawyer's own sense of propriety. There is no doubt that in regard to advertising and the use of business methods, a great change has come over the profession during the last fifty years. In a recent address before the University of Oregon, Judge Stephen A. Lowell remarked that the lawyer of the old school, who maintains the ideals of his profession, was "being slowly crushed between centralization of commercial interests on the one hand, and the sharp practice of his competitors on the other." In commenting on this statement the *Kansas City Star* says: "If this were really true, or, in any sense, a necessary result of the present conditions, nothing could be more deplorable." That the statement of Judge Lowell is true no lawyer acquainted with the conditions existing in the profession at the present day can deny, but that such conditions deserve the comment which the *Star* makes cannot be so readily accepted. It must be kept in mind that the character of litigation has changed. Whereas, in former years, the great mass of the law business was personal, it is to-day more largely commercial; and indeed, to this very exposure of the profession to commercial influences may be attributed the reason for the subversion of the ideal to the practical and financial side of professional practice. James B. Dill, the great corporation lawyer, says, "The great bulk of the work of the profession has been turned into industrial creation and adjustment. Specialism has split it up into a half dozen or more divisions, and a lawyer who is now able to master more than one sort of practice is a genius. The profession has lost nearly all of its old, æsthetic, ostentatious attractions." These changes, which have been operating on the practice of the law and have resulted almost in making it a business rather than a profession, must be taken into account in answering the question of what are proper and what improper methods of advertising. Certainly the business features of the law permit of a wider range in advertising than formerly, so long as it does not go beyond a modest announcement. Anything that goes beyond this is vulgar and approximates too closely the ways of the quack "who crieth

out with a loud voice and is heard afar off in the market place."

Another reason for the change in the attitude of the profession as to the ethics of advertising is offered by Mr. J. B. Martindale, editor of Martindale's American Law Directory: "The profession of the law," says Mr. Martindale, "in the times when such ethics obtained, was strictly an honorable one, and its followers, being gentlemen of wealth, pursued it, not as now for the purpose of making a living; nay, it was even no less dishonorable to take pay for services than it was to seek an employment. Does the modern advocate of the old honored custom attest his sincerity by scorning to accept compensation for his own services? If not, is it noble in him, having discarded half the rule himself, to disclaim the young attorney's right to discard the other half? Happily, this old rule of ethics is now obsolete, and the practice of law is becoming purely a matter of business."

Still another view is presented by Mr. Walter S. Carter, member of one of the most prominent law firms in New York City. In addressing some remarks to the Phi Delta Phi Fraternity at Columbia University, he said: "When I came to the bar, forty-three years ago, very few, if any, good lawyers, advertised. To-day all that has changed. In the English Law List, which is the official organ of the bar of that country, are to be seen the cards of Evarts, Choate & Beaman, Parsons, Shepard & Ogden, our own firm, and those of several others in New York. I think the strongest, as it is one of the largest firms in the world, having thirteen partners, is that of Blake, Lash & Cassels, of Toronto, whose card I see in all the foreign law lists, and in well nigh all our own legal and banking directories. Of course, the advertisement must be a dignified one; merely a card, nothing more. * * * It is just as legitimate and proper for a lawyer to publish his card, preferably in a legal or banking journal, as it is for a business man to advertise his business."

These statements from representative men at the bar evidence the strong tendency of the profession toward the adoption of business methods. While this tendency, cannot be said to be an unmitigated evil, and that there are many features about it that are a vast improvement over the old manner of doing business, we will be pardoned for expressing a regret that, for this improvement, we are probably forced to sacrifice one of the noblest ideals of the law—that of a place among the learned professions. The words of an eminent author in this connection are pertinent: "But there have been lawyers who were orators, philosophers and historians. There have been Bacons and Clarendons, there will be none such any more till in some better age, true ambition, or the love of fame, prevails over avarice, and until men find leisure and encouragement to prepare themselves for the exercise of this profession by climbing up the vantage ground of science, instead of grovelling all their lives below in a mean but gainful application to all the little arts of chicane." In spite of this tendency let us cherish the hope, however, that the pecuniary advantages of the profession, which are now so much greater than in former times may not prove so attractive as to lure us away from a thorough acquaintance, a constant study and an ever-ready defense of its time-honored principles.

NOTES OF IMPORTANT DECISIONS.

SHERIFFS—LIABILITY FOR ACTS OF DEPUTY.—A sheriff, of course, like every other principal, is responsible for the acts of his deputies. But he cannot be mulcted in exemplary or punitive damages. Thus, in the recent case of Nixon v. Rauer, 66 Pac. Rep. 221, the Supreme Court of California, held that a sheriff, though liable for injuries done by his deputy, cannot be charged in exemplary damages for misconduct of such deputy as though he had personally committed the acts. There is no doubt of the correctness of the court's decision in this case. Where a party does not personally participate in a trespass, he cannot be punished for a wrong which he never committed, but is liable only for the pecuniary damages which he puts in the power of another to inflict. The malice of the deputy cannot be imputed to the principal. The rule was well stated in a recent case: "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by

reason of wanton, oppressive or malicious intent on the part of the agent." Railroad Co. v. Prentice, 147 U. S. 107, 13 Sup.Ct. Rep. 261, 37 L. Ed. 97; Warner v. Railroad Co., 113 Cal. 105, 45 Pac. Rep. 187, 54 Am. St. Rep. 327; Trabing v. Improvement Co., 121 Cal. 143, 53 Pac. Rep. 644.

MUNICIPAL CORPORATIONS—REASONABLENESS OF ORDINANCE PENALIZING PURCHASE OF LOTTERY TICKETS.—A San Francisco city ordinance makes it unlawful for any person to have in his possession any lottery ticket. In the recent case of *Ex parte* McClain, 66 Pac. Rep. 69, the petitioner who was convicted of a violation of this ordinance, sought release upon the asserted ground that the ordinance in question was unreasonable. The court denied the contention and held that under the article of the constitution empowering cities and counties to make and enforce within their limits such local, police, and sanitary regulations as are not in conflict with general laws, such ordinance was not void as being an unreasonable and oppressive police regulation. The court expresses itself very convincingly:

"There are, then, against all gambling devices of this kind, not only the public policy of the general government and of this state, but also the express mandate of their criminal laws, so that the avowed policy and the expressed intent is to stamp out by penal legislation the traffic in lottery tickets. It is true that the state, while declaring it to be a penal offense to sell a lottery ticket, has not made the purchaser equally culpable. But no one will question the right of the state to declare, if it see fit so to do, that the purchaser of a lottery ticket, equally with the seller, is guilty of a misdemeanor. It may be concluded, therefore, that in a reasonable exercise of its police powers a municipality may pass any ordinance in furtherance of the avowed general policy of the national and state government. In this regard our cities and counties draw their power, not from legislative permission, but from the direct grant of the constitution itself, which by article 11, § 11, empowers them to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

DEAD BODY—RIGHT OF PROPERTY IN MUMMIES.—The extraordinary case of Aitken v. London and Northwestern Railway Co. (Times 12th inst), before Darling, J., and a special jury this week, in which the plaintiff sued the defendant company for negligence in the custody of a mummy brought from Peru, seemed at one time to be in danger of going off upon the point that there can be no property in a dead body. That such is the ordinary rule there is no doubt, and an interesting discussion of the law upon the subject will be found in the judgment of Kay, J., in Williams v. Williams, 20 Ch. D. 659, a case which arose upon the validity of a direction by a testator to a person not an executor to burn his body. The direction was carried out after the burial of the body by the executors, but it was held that the expense of £321 incurred in so doing was not recoverable from them. The law as to a dead body is that there is no ownership of it, but the executors have a right to the custody and possession of it until it is properly buried. The rule was exemplified in Reg. v. Fox, 2 Q. B. 246, where a gaoler had refused to deliver up to the executors the body of a person who died while a prisoner, unless they would satisfy certain claims by the debtor. This new form of lien was rejected, and the executors' right to possession was enforced by a peremptory *mandamus*. Much information also as to the disposal of the dead is to be found in the charge of Stephen, J., to the jury in Reg. v. Price, 12 Q. B. D. 247, where he declared the practice of cremation to be lawful, provided it was not done so as to amount to a public nuisance. But while all this is true of the body of a person who has recently died, or, though the death has not been recent, who has been buried under such circumstances that any interference with the body would be shocking to the feelings of survivors different considerations arise in the case of a corpse which, by artificial preservation and the lapse of centuries, has passed into the state of a mummy. It has then become an object of curiosity, and from being an object of curiosity it is a short step to become also an article of commerce. It is brought down to the level of common things and rights of property attach. The probability of any question arising as to when a dead body ceases to be a corpse and becomes a mummy is rather remote.—*Solicitors' Journal.*

PROVABILITY IN BANKRUPTCY OF A FINE IMPOSED BY THE COMMONWEATH FOR A MISDEMEANOR.—The United States District Court for the Western District of Kentucky handed down a decision by Evans, J., on the 21st of October last, *In re* Moore, reported in American Bankruptcy Reports, Vol. 6, page 590, which is the second and last adjudication of the question stated in the caption under the present bankruptcy law. Although a question of rare occurrence it is one of considerable import involving, in which ever way decided, the constiutionality of two sections of the bankruptcy act. The other decision was from the United States District Court of West Virginia by Jackson, J., *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. Rep. 544, in which the court came to the diametrically opposite conclusion to which the Kentucky court arrived. Besides being an original question of considerable import it is interesting to observe the divergent logic and contradictory conclusion reached by two able jurists arguing from the same premises.

In each case the conviction had been procured and the claim of the state reduced to a personal judgment against the practitioner before the filing of the petition. Section 17 of the Bank-

ruptcy Act provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as, etc," specifying certain debts not discharged and not including fines. Hence if the fine be provable then under section 17 it would be a dischargable debt. Section 63 provides what debts may be proved and allowed against the bankrupt's estate, and among other classes of debts expressly provided for is "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owning at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest." Construing these sections literally the unavoidable conclusion seems to be that such a claim is provable. The West Virginia court so holds, saying that section 63, as quoted, "expressly declares that where a liability is evidenced by a judgment it is a provable debt. There is no qualification of the language employed in the statute which would tend to show that congress intended to make a distinction in regard to judgments obtained against the bankrupt, either in favor of the United States or of a state. The construction that I give to this statute does not confine the proof of debts to the citizens of the country but permits judgments obtained in either the courts of the United States or of a state against the petitioning creditor to be proved." Then citing section 17 the court continues: "This provision is the only one referring to any demand or claims that a state may urge against a bankrupt and it is specific in its language. The section provides the only limitation that would prevent a bankrupt from obtaining a full discharge from all his debts."

On the other hand the Kentucky court places a more liberal construction upon the sections cited and deduces from the West Virginia court's construction results which appear to the Kentucky court an absurdity, viz., that such an operation of the bankrupty act would be an unconstitutional interference by the federal government with the execution of state penal statutes. The court says: "In my opinion it was never intended in this indirect way (in derogation of the exclusive right of the chief executive to pardon offenders or to remit fines imposed upon them) to relieve criminals from penalties incurred for criminal acts. It seems to me that to rule otherwise would make the bankrupt court the means of frustrating proper efforts to enforce criminal statutes enacted for the public welfare. Congress in my opinion never so contemplated or intended. * * * The provisions of the bankrupt act have reference alone to civil liabilities as demands between debtor and creditor as such, and not to punishments inflicted *pro bono publico* for crimes committed. Any other construction would seem to be absurd, and might trench, as already indicated, upon the exclusive constitutional right of the chief magistrate, state or national, to remit fines and grant pardons. If these principles are sound, their operation will control in regard to the judgments of federal courts as well as to the judgments of state courts in criminal cases."

Aside from the question raised by the Kentucky court of federal interference with state rights, the operation allowed the bankrupt act by the West Virginia court would be an unprecedented assumption by the legislative and judical departments of the government of an exclusively executive prerogative. To avoid such results, without so far as the decision shows considering the evils that might result from such a construction, the court held, adversely to the West Virginia court, that such fines are not provable debts. So that the *status* of a fine is still undefined.

Under the decision of the Kentucky court there are three courses left to the state to pursue to satisfy its judgment:

First. If the court be correct in its statement that the provisions of the bankrupt act have reference alone to civil liabilities as demands between debtor and creditor as such and in its holding that a fine is not such a liability, then it is possible that the state could satisfy its claim by an execution upon the assets of the bankrupt in the hands of the trustee in bankruptcy, since if the bankruptcy court has no jurisdiction over the claim of the state it would be powerless to prevent the state making its debt out of any available funds of the bankrupt. This in effect would be making the state's claim a prior one over the general creditors.

Second. The state could wait until the assignment of his exemptions to the bankrupt and then satisfy its debt out of the exemptions. But this would defeat one of the primary purposes for which the bankrupt act was enacted, to-wit, to offer to persons hampered by debts an opportunity to begin over again with an allowance out of their property sufficient to provide temporarily for themselves and their families.

Third. The state can seize the bankrupt's person and imprison him.

The Kentucky court seems to have been guided to its decision by questions of constitutional construction and an observation of the legal consequences attendant upon the decision of the West Virginia court. The West Virginia court seems rather to have placed upon the two sections what, in the language of the civilians, he evidently considered the authentic interpretation. Neither court seems to have deducted from its conclusions the practical effects upon the bankrupt himself in his relation, so to speak, as the ward of the bankrupt court.

TRUSTS—THEIR USES AND ABUSES.

1. *The Meaning of a Trust.*—A trust is a dominant combination of money, property, business or commercial power or energy. The form of the union is unimportant. It may be an association, incorporated or otherwise, it may be a single individual or a partnership. The essential element of the combination is the purpose to dominate, and this domination is the tendency which has created the most apprehension. If the charter of every prominent combination of capital or dominant company expressed the real intent of the organization, instead of reading "To manufacture, transport and market," the particular product in question, it would state as the purpose of the company, "To dominate in the manufacturing, to dominate in the transportation," and, what is quite as important, "To dominate in the market" of the product. The same tendency and intent to dominate is signified by the names of the organizations, "United States," "Colonial," "Federal," and finally "National," and even "International." All of this, both of structure and of name, indicates a purpose on the part of the organization to dominate in the markets of the world. It is not the combination in itself that is vicious, but it is the methods employed by some corporations in the attempt to dominate which creates the tendencies which are dangerous.

2. *The Origin and Development of the Trust Idea.*—Recognizing that the combination and the consolidation of capital is a force, we spend no time in asking why it is here, further than to say that it is a part of the best growth and sound expansion of the American nation. It is essentially a part of the successful, aggressive American policy of commercial supremacy. As this country expands it requires its financial and commercial foundation to be strengthened in order to compete with other nations. This the industrial movement of to-day is effectuating and successfully accomplishing. The tendency towards centralization is seen in financial life. The great banks are becoming greater and are establishing branches in all directions through a stock control of smaller banks or otherwise. One might be charged with lack of conservatism should he suggest the possibility of the establishment of a great bank, perhaps under governmental influence, which shall act as a governor and regulator of the great financial machinery of this country. Is the anticipating payment of bonds or otherwise by the treasurer of the United States more than a mere temporary expedient on the part of the government to steady the finances of this country to prevent panics? Carrying this proposition to its logical extent, and having in mind the history of the great Bank of England, some assert that when this country becomes the great finance and credit power of the world, the trend of affairs will be toward the establishment of one great controlling financial institution under the United States law.

3. *The Most Dangerous Tendency of Trusts.*—The tendency of the great corporations is to become in a measure callous to public opinion, an error it may be on the part of the corporation, but unfortunate so far as the public at large are concerned. This indifference to public opinion and legislation is to a certain extent due to the fact that from the corporate standpoint many of the criticisms passed upon corporations, and much of the anti-corporation legislation, is based upon a lack of understanding of the situation.

Many of the shafts which have been aimed at industrial combinations and at the movement as a movement emanating from the individual, from the politician and from the legislator have been the product of the mind of that class of people who have a pet theory peculiar to themselves for the cure of all ills incident to mankind by the adoption of a theory or the passage of a law. Many of the attacks upon combinations have been aimed at the supression of the movement rather than to the elucidation of the subject and the utilization of the force. Such attacks, legislative or otherwise, while dangerous to the combinations, react strongly against the public. This element of danger from the combination is itself in turn productive of a danger from the combination to the public itself. Ill-advised popular clamor, resulting likewise in unwise and ill-advised legislation, always tends to force combinations of capital, which should otherwise devote their attention to commercial matters, into the great field of legislative competition,

and ultimately, and as a logical result, into politics. Any attempt on the part of these industrial organizations to enter, voluntarily or otherwise, into the field of legislation and politics, is a tendency which is to be regarded with grave apprehension.

4. *Trust Stocks as Gambling Devices.*—That combination which is governed, which is controlled through its management for the purpose of advancing or depressing the price of its securities on the market, is run on a principle other than that of a commercial enterprise, and must ultimately land where it belongs, in the gutter. At this point, too, the director ceases to direct the affairs for the benefit of the stockholder, the trustee ceases to be a trustee for the stockholder whom he represents. The officer may be tempted to refuse information to the stockholder in order that he may use it for his own benefit. The temptation is to declare dividends or withhold them for the purpose of raising or depressing the market price of the securities, rather than to equitably distribute what belongs to the stockholder. The tendency of the great and sound corporations is to recognize this fact and to attempt by all legitimate means to avoid having the securities of their own corporation the football of speculation, either public or private. This is one of the evils which is curing itself, but nevertheless is a tendency to which it is proper to call attention. The example of the United States Steel Corporation in issuing to each of its stockholders, with each dividend, a statement of its net earnings from operations is an announcement to the world that this great leader of combinations does not propose to be justly characterized as a blind pool; that it does not propose that its stock shall be justly excluded from the list of industrial investments as distinguished from speculative specialties. This is an example sure to be followed by many other industrials which cannot afford to take a lower position in this respect.

5. *Publicity the Most Effectual Remedy.*—Publicity with regard to corporations is of two kinds, public publicity and private publicity.

Public publicity is not yet practiced to any extent by industrial combinations, and legislation has not yet been able to procure it. Private publicity, or information to the stockholders, is not always carried out to its fullest extent. Knowledge of immediate facts is sometimes conveyed only to an inside circle, a circle less in circumference in many cases than the board of directors, and by no means including all the officers of the corporation. Publicity must be secured by legislation, either national or state, and the latter, to be effectual, must be practically uniform among the states. The time is coming when public publicity will be an essential element of the success of every industrial combination which seeks its support from the public. As between combinations themselves, the sound corporation will avail itself of the opportunity to demonstrate its soundness by public statements, and in such demonstration force to a lower position its competitor, who is unwilling and inferentially unable to make the same public showing. Public confidence is and must be the essential element of the success of any industrial. Public confidence cannot be based upon anything but knowledge of the facts, and this knowledge of the facts must come from the corporation by way of statements to the public, for the accuracy of which statements some one is responsible. The better corporations are voluntarily practicing publicity, they would favor a statute which secured public publicity from all corporations. This would redound not only to the benefit of the public, to the steadying of industrial finances, to the making of industrial securities a permanent investment for holders, large and small, but would also prevent the formation of blind pools, industrial swindles, and tend to avert financial panics. Publicity is to industrials what street lighting is to municipalities. It promotes legitimate business and prevents crime.

6. *Divergent State Legislation in Favor of and Against Trusts.*—A danger both subjective and objective. A menace both to the combination and to the people is found in the competitive strife among states for revenue from corporations. Just so long as it is possible for a corporate organization in one state to do business in many other states which is forbidden to its own corporations, just so long will we find different states offering inducements to capital to incorporate under their peculiar laws. To-day we find states giving express permission to

their own corporations to do in other states what such corporations are expressly prohibited from doing at home. For years the state of New Jersey stood pre-eminent among the charter-granting states, until from the revenue derived from corporations she practically abolished the necessity for state taxes, contributed large sums to schools, for good roads, and for matters of public use and utility. At the beginning of this month the state of New Jersey had in its treasury something over $2,000,000 as a surplus. In 1900 the state of New York although it had for years waged war upon New Jersey's system of incorporations, gave way to the contrast between the state of its treasury and that of New Jersey. New York out-Jerseyed New Jersey in so-called liberality to corporations. It amended its corporation act upon the theory that the greatest paper liberality would produce the greatest revenue. The staid old state of Connecticut followed suit and opened its doors, offering its inducements to corporations. The states of Maine and North Carolina followed the example of New York and Connecticut. The states of Delaware and West Virginia had already adopted every provision which could be suggested to make the state a successful charter-granting state and to increase their revenue, and finally South Dakota comes forward with a proposition that it will grant to a corporation everything that it will ask, and for a consideration so minute as to be scarcely worth mentioning. On the other hand, influenced by the cry against monopolies, making no distinction between the combination of to-day and the monopolistic trust of yesterday, other states have filled their statute books with discriminations against business combinations until it is almost impracticable to do business within the state. State legislation is each year growing more divergent, and we can look in that direction with no assurance to any uniformity of procedure and regulation of corporations.

7. *Federal Intervention and Control.*—The question is national in extent and breadth. It can only be dealt with by legislation equally as broad, that is, national legislation. The objection to national legislation is suggested that it would be unconstitutional. The Supreme Court of the United States found its way out of the same difficulty when suggested in the case of the national banking act. It might be said in the present case that the public welfare more urgently required a national corporation act than the same public welfare required a national banking act. To say nothing of the commercial interests of the country, the financial interests are to-day interested to a larger extent in industrial securities than in banking when the national banking act was passed

I do not wish to be misunderstood as to the character of the industrial movement of to-day. It is of the highest order, and is progressing in the right direction. It has been, and is to-day, productive of great good to this country. It is a direct contributing factor to the commercial advancement of the United States. Theorists, social reformers and students of economics have argued against the character of the industrial life of to-day. They overlook the fact that, while there are dangerous tendencies, as have been frankly admitted, there are ills which are natural to mankind in any position, not to be cured by hasty legislation, not to be overcome by vituperation and abuse, but rather to be minimized, and perhaps ultimately eliminated by wise, conservative examination and decision upon the question of a whole derived from the experience of the people.—*James B. Dill, in an Address before the Merchants' Club of Chicago.*

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER AS SURETY.

HARTLEY v. SANFORD.

Court of Errors and Appeals of New Jersey, November 15, 1901.

The defendamt's son was indebted to M, who desired additional security. The defendant thereupon applied to the plaintiff to become surety for the son, and promised to reimburse him if he was compelled to pay the debt. Accordingly the plaintiff came besurety, and afterwards was obliged to pay the debt. Held, in an action on the promise, that it was within the statute of frauds, as a "special promise to answer for the debt, default or miscarriage of another."

DIXON, J.: The material facts of this case, as disclosed by the record, are that the defendant's son was indebted to M, who desired additional security; that thereupon the defendant applied to the plaintiff to become surety for the son,

and promised him that, if he was compelled to pay the debt, he (the defendant) would reimburse him; that accordingly the plaintiff became surety for the son, and subsequently was obliged to pay the debt. This suit was brought upon the promise, which was oral only. It appears that at the trial in the Passaic circuit the jury were instructed to find for the plaintiff if they were satisfied the promise had been made, but the question as to the legal sufficiency of the promise was reserved and certified to the supreme court, which afterwards advised the circuit that the promise was valid, and thereupon judgment was entered on the verdict.

In this court error has been assigned on the charge at the circuit, as well as on the advisory opinion of the supreme court; but, there being no bill of exceptions presenting the charge, the assignment of error respecting it is futile, and must be disregarded. The assignment upon the opinion of the supreme court is legal, and presents the only question now before us, which is whether the plaintiff's suit can be maintained, in view of our statute, "that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the person to be charged therewith or some other person thereunto by him or her lawfully authorized." The advice of the supreme court was based upon its opinion that under the adjudications in this state the promise of one person to indemnify another for becoming surety of a third is not within the statute. The cases cited in that opinion to support this view are Apgar's Admrs. v. Hiler, 24 N. J. Law, 812; Cortelyou v. Hoagland, 40 N. J. Eq. 1; and Warren v. Abbett (N.J. Sup.), 46 Atl. Rep. 575. Of these, the only one of controlling authority here is that of Apgar's Admrs. v. Hiler, which is a decision of this court. That decision does sustain the broad proposition for which it was cited. This court there held merely that, between two persons who had signed the same promissory note as sureties for another signer, the oral promise of one surety to indemnify the other was valid. This promise was deemed outside of the statute, because by signing the note the promisor had himself become a debtor, and so his promise to indemnify was to answer for his own debt. In Cortelyou v. Hoagland several stockholders and directors of a corporation had promised to indemnify another stockholder and director for indorsing a corporate note, and Warren v. Abbett was of similar character. In the Cortelyou case the chancellor rested his decision on Apgar's Admrs. v. Hiler, which, as above stated, was essentially different and on Thompson v. Coleman, 4 N. J. Law, 216, which was a promise to indemnify a constable for selling under execution goods claimed by an outside party,—a case where the promisee had no redress except on the promise, and therefore clearly outside of the statute. If the decision in Cortelyou v. Hoagland and Warren v. Abbett are to be supported on prior New Jersey adjudications, such support must be found in the doctrine that where the consideration of a promise to answer for the debt, default, or miscarriage of another is a substantial benefit moving to the promisor, then the statute does not apply. This rule was recognized in Kutzmeyer v. Ennis, 27 N. J. Law, 371, and Cowenhoven v. Howell, 36 N. J. Law, 323. To support those decisions on this rule, it must be held that the payment of a corporate debt is substantially beneficial to the stockholders or directors of the corporation,—a proposition which seems to be denied in other tribunals. Browne, St. Frauds, § 164. In the promise now under consideration there was no such element, and no case has been found in our reports involving the present question. We should therefore decide the matter on principle, or as nearly so as related adjudication will permit. Looked at as *res nova*, it seems indisputable that the defendant's promise was within the statute. It was to respond to the plaintiff in case the defendant's son should make default in the obligation which he would come under to the plaintiff as soon as the plaintiff became surety for him,—an obligation either to pay the debt for which the plaintiff was to be surety, or to reimburse the plaintiff if he paid it. In this statement of the nature of the promise there is, I think, every element which seems necessary to bring a case within the purview of the statute. The parties, in giving and accepting the promise, contemplated (1) an obligation by a third person to the promisee; (2) that this obligation should be the foundation of the promise, *i. e.*, that the obligation of the son to the promisee should attach simultaneously with the suretyship of the plaintiff, and thereupon should arise the obligation of the promisor for the fulfillment of the son's obligation; and (3) that the obligation of the promisor should be collateral to that of the son, *i. e.*, if the latter should perform his obligation, the promisor would be discharged, while, if the promisor was required to perform his obligation, that of the son would not be discharged, but only shifted from the promisee to the promisor. An examination of the cases will show that not many of them are in conflict with this view, when they are free from differentiating circumstances. In the leading case of Thomas v. Cook, 8 Barn. & C. 728, such a circumstance appears in the fact that the promisor was himself a signer of the bond against which he promised to indemnify the promisee, and thus the promise was, in a reasonable sense, to answer for that which, as to the promisee, was the promisor's own debt. On this difference may be explained the decisions in Jones v. Letcher, 13 B. Mon. 363; Horn v. Bray, 51 Ind. 555, 19 Am. Rep. 742; Barry v. Ransom, 12 N. Y. 462; Sanders v. Gillespie, 59 N. Y. 250;

Ferrell v. Maxwell, 28 Ohio St. 383, 22 Am. Rep. 393; and others—resting on the rule applied in Apgar's Admrs. v. Hiler, 24 N. J. Law, 812. The remark of Bayley, J., in Thomas v. Cook, that a promise to indemnify was not within either the words or the policy of the statute, has caused much of the confusion existing on this subject, but is more than counterbalanced by the observations of Lord Denman in Green v. Creswell, 10 Adol. & E. 453, and Pollock, C. B., in Cripps v. Hartnoll, 4 Best & S. 414, to the effect that a promise to indemnify may be also an undertaking to answer for the debt or default of another, and that when it is it comes within the operation of the statute. Another circumstance taking cases out of the simple class with which we are now concerned is that mentioned in Kutzmeyer v. Ennis, 27 N. J. Law, 371, 376, viz., the existence of a new consideration beneficial to the promisor, or, as it is sometimes expressed, moving to the promisor. Such cases are Smith v. Sayward, 5 Greenl. 504; Lucas v. Chamberlain, 8 B. Mon. 276; Mills v. Brown, 11 Iowa, 314; Reed v. Holcomb, 31 Conn. 360; Smith v. Delaney, 64 Conn. 264, 29 Atl. Rep. 496, 42 Am. St. Rep. 181; Potter v. Brown, 35 Mich. 274; Comstock v. Norton, 36 Mich. 277; Harrison v. Sawtel, 10 Johns. 242, 6 Am. Dec. 337; Sanders v. Gillespie, 59 N. Y. 250; Tighe v. Morrison, 116 N. Y. 263, 22 N. E. Rep. 164, 5 L. R. A. 617. Cases of still another character are sometimes cited in support of the statement that contracts to indemnify are outside of the statute, such as Cripps v. Hartnoll, 4 Best & S. 414; Reader v. Kingham, 13 C. B. (N. S.) 344; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Keesling v. Frazier, 119 Ind. 185, 21 N. E. Rep. 552; Beaman's Admrs. v. Russell, 20 Vt. 205, 49 Am. Dec. 775. But these judgments rest on the same idea as Thompson v. Coleman, 4 N. J. Law, 216,—that there existed no other liability to the promisee than that of the promisor, and so manifestly the statute was not applicable. On the other hand, there is sufficient judicial authority for the proposition that an undertaking to indemnify a person for becoming surety for another is, in the absence of any modifying fact, a promise within the statute. Green v. Creswell, 10 Adol. & E. 453; Simpson v. Nance, 1 Speer, 4; Brown v. Adams, 1 Stew. 51, 18 Am. Dec. 36; Kelsey v. Hibbs, 13 Ohio St. 340; Clement's Appeal, 52 Conn. 464; Bissig v. Britton, 59 Mo. 204, 21 Am. Rep. 379; Nugent v. Wolfe, 111 Pa. 471, 4 Atl. Rep. 15, 56 Am. Rep. 291; Draughan v. Bunting, 31 N. Car. 10; Hurt v. Ford (Mo.), 44 S. W. Rep. 228; and May v. Williams, 61 Miss. 126, 48 Am. Rep. 80,—were decided on this basis. In the case last mentioned, Porter, J., stated the true rules very clearly and concisely. No doubt, there are opposing cases which cannot be explained on any distinguishing circumstances. Such seem to be Chapin v. Merritt, 4 Wend. 657; Jones v. Bacon (N. Y.) 40 N. E. Rep. 216; Dunn v. West, 5 B. Mon. 376; Vogel v. Melms, 31 Wis. 306, 11 Am. Rep. 608; and Wildes v. Dudlow, L. R. 19 Eq. 198. But some of these cases merely follow Thomas v. Cook, *ubi supra*, without noticing the distinction which the latter decision has justified, while others appear to have been induced by the injustice of a refusal to enforce a promise on the strength of which the promisee incurred his liability, rather than by a ready purpose to execute the will of the legislature.

No doubt, injustice may result from the enforcement of the statutory rule; but that rule sprang from a conviction that its adoption would prevent more wrong than it would permit, and its enactment in England and perhaps every state in this union indicates the generality of this assurance. Said Mr. Justice Sterrett in Nugent v. Wolfe, *ubi supra:* "The object of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and it should be enforced according to its true intent and meaning, notwithstanding cases of great hardship may result therefrom." With more detail did Chief Justice Shaw, in Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148, say: "The object of the statute, manifestly, was to secure the highest and most satisfactory species of evidence in a case where a party, without apparent benefit to himself, enters into stipulations of suretyship, and where there would be great temptation on the part of a creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of the debtor,—a father, son, or brother,—by means of false evidence, by exaggerating words of recommendation, encouragement to forbearance, and requests for indulgence into positive contracts."

Our conclusion is that the promise proved at the trial was insufficient to sustain the action, that the judgment for the plaintiff should be reversed, and that, in accordance with the reservation at the trial, a verdict and judgment should be entered in favor of the defendant.

NOTE.—*The Promise to Indemnify Another for Becoming Surety of a Third Person as Within the Statute of Frauds.*—No more difficult or unsettled question of law exists to-day than that propounded in the subject of this annotation, and on no question are the authorities in more hopeless confusion. The preponderance of authority seems to be against the position of the court in the principal case—not, however, so great as before this decision, which in overruling the prior New Jersey cases, transfers that state from the majority to the minority side of the question. And, as yet, in many states, the question is still unsettled, the importance of a clear understanding of the principles involved cannot be overestimated.

A promise to answer for the debt, default or miscarriage of another is one of the familiar provisions of statutes of frauds wherever enacted. The object of requiring all such agreements to be in writing is clearly to render impossible the attempt to prove the existence of contracts of this character by perjury or by exaggerating the representations or requests of the debtor's friends. Several principles must be borne in mind. In the first place, such

promise must be *collateral* to another and wholly independent of the promise of the original debtor to the promisee. The promise is to answer for the debt, default or miscarriage of *another*. In the second place the promisee must look originally to the debtor and not to the promisor for relief or payment. The promise contemplated by the statute is one "to *answer* for the debt," etc. of another. If credit is extended only to the promisor on his special promise and not to the debtor, that is, if the plaintiff enters into his engagement relying solely on the promise of the defendant, the case is not within the statute, neither is there ordinarily in such a case any obligation on the nominal debtor; it is more in the nature of an original agreement between the promisor and the promisee for the benefit of a third person, then a guaranty although it assumes the latter form.

Whether a parol promise to indemnify one who becomes surety for another at the request of the promisor is within the reason and contemplation of the provisions of the statute of frauds just announced is certainly not free from difficulty and has baffled the logical faculties of many a court for a solution. In England the courts vacillated for some years. In Thomas v. Cook, 8 B. & C. 728, a promise to indemnify was held not to be within the statute. In Green v. Cresswell, 10 Ad. & E. 453, the contrary view was announced. These are the two leading cases on which the authorities on both sides of the question base their respective arguments. In Thomas v. Cook, the plaintiff, upon defendant's special promise to idemnify him, joined with him as surety on the bond of a third party to secure his debt to a fourth. The defendant's promise of indemnity was held not to be within the statute. It will be observed that in this case that the only obligation of the third party to the plaintiff was that which could be implied by law from the latter's being compelled to pay the debt. In Green v. Cresswell, the plaintiff, on defendant's special promise to indemnify him, became bail for a third party who was arrested for debt. The court held the promise to be within the statutes on the ground that it was merely collateral to the third party's *implied* obligation to indemnify his surety. In Cripps v. Hartnoll, 4 B. & S. 414, the distinction was attempted to be drawn in those cases in which the promisee was surety upon a bond by which the principal was bound to answer a criminal charge, and those in which the bond was given in a civil cause, the court saying that there was no implied contract on the part of a principal who was bound over to answer a criminal charge to indemnify his surety, and, therefore, that the promise of the promisee did not come in aid of that of another person. We assent to the language of the court in May v. Williams, 61 Miss. 125, 132, in criticising this distinction: "We do not assent to the proposition that a principal in a bail bond is not under an implied contract to indemnify his surety. He knows that the law requires some one to be bound for his appearance as a condition to his discharge from custody; he executes the instrument by which the surety is bound, and by the bond he becomes bound as principal to that surety." In Wildes v. Dudlow, L. R. 19 Eq. 198, the case of Green v. Cresswell was overruled. In that case the promise was to indemnify the plaintiff if he would sign himself as joint maker with defendant's son on a note for the latter's accommodation. The court held this promise not to be within the statute for the reason that a promise to be within the statute must be made to the promisee to pay a debt due by another to him. Such is the history of the law on this subject in England.

In America any attempt to reconcile the authorities would be fruitless. The following authorities follow the rule laid down in Thomas v. Cook: Tighe v. Morrison, 116 N. Y. 263; Anderson v. Spence, 72 Ind. 315; Aldrich v. Ames, 75 Mass. 76; Potter v. Brown, 35 Mich. 274; Smith v. Sayward, 5 Me. 504; Smith v. Delaney, 64 Conn. 264; Demeritt v. Bickford, 58 N. H. 523; Minick v. Huff, 41 Neb. 516; Jones v. Letcher, 13 B. Mon. 363; Mills v. Brown, 11 Iowa, 314; Goetz v. Foos, 14 Minn. 265. The following authorities follow the rule laid down in Green v. Cresswell: Nugent v. Wolfe, 111 Pa. St. 471; Brand v. Whelan, 18 Ill. App. 186; Simpson v. Nance, 1 Speer (S. Car.), 4; May v. Williams, 61 Miss. 126; Bissig v. Britton, 59 Mo. 206; Kelsey v. Hibbs, 13 Ohio St. 340; Draughan v. Bunting, 31 N. Car. 10. In the case of Tighe v. Morrison, 116 N. Y. 263, defendant and one D, having been appointed adminstrators on condition that they file the usual bond with two sureties, agree between themselves that each should furnish a surety. Defendant applied to plaintiff to sign the bond, stating that he had an interest in the estate as it was indebted to him, and upon his oral guaranty to save plaintiff from all loss, plaintiff consented and executed the bond. On being compelled to pay for a default of D, as administrator, plaintiff brought suit upon the guaranty. Held, that the agreement was not within the statute for the reason that the promise was an original one, not severable in its nature, and legally beneficial to the defendant only. In Anderson v. Spence, 72 Ind. 315, A verbally agreed to indemnify B against all loss, if he would enter into a recognizance for the appearance of C, who was under indictment for a felony. The court held that such an agreement is an original promise, and not within the statute of frauds, and that B might recover from A upon such verbal agreement whatever loss he might have sustained by C's forfeiture of the recognizance. The court said: "There is, in principle, an obvious and important difference between a contract of guaranty and one of indemnity. The former is a collateral undertaking and presupposes some contract or transaction to which it is collateral. A contract of indemnity is essentially an original one. Between the promisor and promisee there is a direct privity. Between the person to whom the promise of indemnity is given, and the person for who the latter undertakes as surety or bail, there is no privity. The contract is an original and independent one, in which there is no debt or default toward the promisee to which there are no collateral contracts, and in which there is no remedy against the third party. A contract of this character has long been held not to be within the statute." In Smith v. Delaney, 60 Conn. 264, the defendant D requested plaintiff to become surety for M, promising to indemnify him, and also stating that he, D, intended to go into the liquor business with M. The court held the special promise of D to be not within the statute. In this case the court makes a peculiar effort to reconcile the previous seemingly contradictory decisions of the court—Reed v. Holcomb, 31 Conn. 360, and Clement's Appeal, 52 Conn. 464. The court said: "In Reed v. Holcomb, where the plaintiff indorsed a note of a third party, in which defendant was interested, and on his promise to see it paid, it was held that the statute of frauds did not apply. In Clement's Appeal, B indorsed notes for G at the request of his father, and on the father'

oral promise to save him harmless. It was held that this promise was void under the statute of frauds, because not in writing. In Clement's Appeal the promisor had no legal or pecuniary interest whatever in the transaction. In Reed v. Holcomb the transaction was for the benefit of the defendant. . . . The two cases are therefore in harmony, for the reason that Reed v. Holcomb is not, as has sometimes been supposed, an authority for the unqualified doctrine of Thomas v. Cook, that a contract of suretyship *is*, but a contract of indemnity is *not*, within the statute; but only for the more limited doctrine recognized elsewhere, in most jurisdictions that Thomas v. Cook is not followed, and consistent with even Green v. Creswell, that where the inducement is a benefit to the promisor which he did not before or would not otherwise enjoy, and the act is done upon his request and credit, such promise is an original undertaking and not within the statute." Such was also the case of Smith v. Sayward, 5 Me. 504, where the principals of a certain agent requested plaintiff to go surety for the latter. It was held that the principal's promise was an original undertaking, and not within the statute, and that the benefit accruing to the principal was a sufficient consideration to support the promise. Such also was the case of Potter v. Brown, 35 Mich. 274. In Demerit v. Beckford, 58 N. H. 523, it was held that if A agrees with B that if B will become surety of C on a note to D, A will see the note paid and indemnify B, and B becomes surety, relying solely upon the promise of A, the agreement is not within the statute. So also in Goetz v. Foos, 14 Minn. 265, the court saying: "The debt in this case was owing by the plaintiff to Sauerbrey [a third person], and the promise to pay it was made not to Sauerbrey, but to the plaintiff. A promise of this character is not within the provisions of the statute of frauds relating to promises 'to answer for the debt, default, or doings of another.' This provision applies only to promises made to persons to whom another is liable." So also in Minick v. Huff, 41 Neb. 516.

The leading case in this country, following the doctrine announced in Green v. Cresswell, is that of Nugent v. Wolfe, 111 Pa. St. 471, where it was squarely and unequivocally held that a parol promise to indemnify one, if he will go security for a third person, is within the statute of frauds. The court said: "The reasoning by which a contract such as this is held to be within the statute is, that as soon as the surety signs the bond, the legal implication arises that if he is obliged to pay it, the principal will be bound to pay him. The principal being bound to reimburse the surety, the engagement of the party who has promised to indemnify the surety is collateral to that obligation, and is simply an engagement that if the principal does not repay the surety he will do so. This, it is contended, is clearly a promise to pay the debt of another." So also to same effect, Brand v. Whelan, 18 Ill. App. 186. In this case the court makes this exception to the rule: "An exception is generally recognized, however, when the indemnitor is himself primarily liable for the debt guaranteed, because, in that case, he only promises to pay his own debt." So also in the case of May v. Williams, 61 Miss. 125, where the court held that an oral promise to indemnify a person for becoming surety on another's bail bond is within the statute. In this case the court strongly argues as follows: "It cannot be said that the promise to indemnify the surety is made to him as debtor and not as creditor. It is true that both the principal and surety are bound to the fourth person, the State; but the contract of the promisor is not to discharge that obligation. He assumes no duty or debt to the State, nor does he agree with the promisee to pay to the State the debt which may become due to it if default shall be made by the principal in the bond. It is only when the promisee has changed his relationship of debtor to the state and assumed that of creditor to his principal by paying to the state the penalty for which both he and his principal were bound, that a right arises to go against the guarantor on his contract. It is to one who is under a conditional and contingent liability that the promise is made; but it is to him as creditor and not as debtor, that a right of action arises on it. Nor do we think it sufficient to take the case from the operation of the statute that the liability of the principal arises by implication rather than by express contract. The statute makes no distinction between a debt due on an implied and one due by express contract. It is the existence of the debt against the principal, and not the manner in which it originates, that makes voidable a parol promise by another to become responsible for its payment." So also in Bissig v. Britton, 59 Mo. 204.

This great conflict of authority cannot be reconciled. The question itself is a most vexatious one, and susceptible to such fine distinctions and metaphysical reasoning as to practically preclude a settlement by mere logic. Practical justice would certainly seem to favor the holding that a promise to indemnify one for going surety for a third person is not within the statute. And yet, on principle, it is hard to see why such a promise is not one "to answer for the debt, default or miscarriage of another." A liability arising by implication is as binding as one expressed in more definite terms, and the opportunity to foist the liability on the friends of the debtor by perjury or exaggeration, is just as available as in cases of more direct guaranty. The mere fact that it is made in the form of indemnity is immaterial. Every contract of guaranty could assume that form if necessary. Taking the plain words of the statute and giving them their plain meaning such agreements are clearly within its terms. The mere fact that such construction will often work injustice in particular cases should not be permitted to defeat the plain and beneficient purpose of the statute itself.

JETSAM AND FLOTSAM.

THE GRAND JURY.

The origin of the grand jury, as we know it to-day, is very difficult to trace to its exact source. Like many other institutions of modern civilization, it has been an evolution, and the germ of it is claimed by some writers, to be found in certain customs which obtained amongst the Anglo Saxons, while others as stoutly maintain that it was brought in by the Norman. It has been contended that trial by jury originated in the time of King Alfred and owes its origin to him. Hallam in his "Middle Ages," discusses the question and presents the evidence upon which some writers have come to the conclusion that trial by jury was derived from the Anglo Saxons and in summing up, he says: "In comparing the various passages which I have quoted, it is impossible not to be struck with the preference given to twelve, or some multiple of it, in fixing the number either of judges or compurgators. This was not peculiar to England. Spelman has produced several instances of it in the early German laws. And that number

seems to have been regarded with equal veneration in Scandinavia. It is very immaterial from what caprice or superstition this predilection arose. But its general prevalence shows that, in searching for the original trial by jury, we cannot rely for a moment upon any analogy which the mere number affords. I am induced to make this observation, because some of the passages which have been alleged by eminent men for the purpose of establishing the existence of that institution, before the Conquest, seem to have little else to support them." "It is not surprising that the great services of Alfred to his people in peace and in war should have led posterity to ascribe every institution, of which the beginning was obscure to his contrivance, till his fame has became almost as fabulous in legislation as that of Arthur in arms."

Whether we accept the opinion of those who claim, that the accusatory tribunal which existed in the reign of the Saxon King Ethelred III., sufficiently resembled the grand jury, as we know it, or not, certain it is, that we come to sure ground in the matter in the reigh of King Henry II.—1154-1189. In his reign the royal justices went their rounds, and the shires were required to present to them the local offenders with the evidence of the crime. Twelve knights, or freeholders, made the presentment on their own sworn evidence, and if they accused any person before the king's justices of murder, theft, or robbery, or of harboring men committing these offenses, or of forgery, or arson, then the accused was subjected to the trial by boiling water, and if he failed therein, he was to suffer the loss of one foot. These twelve men were the accusing jury, and practically performed similar functions to our grand jury, and as the trial by ordeal had not yet been abandoned in the reign of Henry II., when the accusing jury put a person upon his trial, or in other words, found a true bill, the trial was by combat, by fire, or by boiling water, as the offense called for. Even in his reign, however, the trial by ordeal was falling into disfavor, and we find that in the third year of the reign of Henry III., the justices in eyre, for the northern counties were ordered not to try persons charged with crime by the judgment of fire or water.

In the reign of Edward I., the bailiffs of each bailiwick, in order to be ready for the periodical circuits of the justices in eyre, were required to choose four knights, who again were to choose twelve of the better men of the bailiwick, and it was the duty, of the latter, to present all those who were suspected of having committed crimes. Each of them took the following oath: "Hear this, ye justices! that I will speak the truth of that which ye shall ask me on the part of the king, and I will do faithfully to the best of my endeavor. So help me God and the holy apostles." In consequence of the oath which they took they were called the *jurata patriæ*, and for a long time seem to have united the two functions of a grand jury to accuse, and a petit jury to try the accused.

To prevent persons being put upon their trial owing to false and malicious accusations, or to gratify private revenge, it was enacted in the reign of Edward III. that "no man be put to answer without presentment before justices or matter of record or by due process and writ original according to the old law of the land. It was in this reign that the separation of grand and petit jury became an established factor in England criminal jurisprudence, it having been provided by 25 Edward III., ch. 3, that "No indictor shall be put in inquests upon deliverance of the indictees of felonies or trespass if he be challenged for such cause by him who is indicted." In other words, no grand juror could also act as trial juror, in the same case, if objected by the accused. When the enactments referred to with reference to the grand jury had reached this stage, it was only a question of time to dispense with the service of the four knights who were commissioned to choose the jury, and by a precept of the court directly to authorize the sheriff of each county to return the name of twenty four or more persons, from whom the grand jury is chosen, which number gradually settled to twenty-three, a majority of whom must consent in order to frame a valid indictment. Whence it became the custom that however many attend, or actually officiate, twelve at least must concur in presenting an offender.

It seems clear, then, that the origin of the grand jury can be traced back to the reign of Henry II. It was in his reign that the race distinctions so long preserved in England disappeared. In his reign the English language became the language of the people, although Norman French was still spoken by the ruling class. Is it not reasonable to suppose, then, that if the language of the Saxons survived as the language of the united people that some of their customs may have also survived, and that the accusatory tribunal, or grand jury, gradually grew out of forms previously in use, and was composed of elements long familiar to the people of this country.

It may be interesting to notice that in France there is no grand jury, or jury of accusation. It did exist there from 1791 until 1808, when it was abolished by Napoleon. The place of the grand jury is supplied by two government officials, the *procureur du roi*, and the *juge d'instruction*. It is the duty of all magistrates to inform the *procureur* of any crime which may be committed within their districts of which they have information. In cases of heinous crimes it is the duty of the *procureur* to repair to the spot and collect the evidence. He may examine witnesses, and reduce their depositions to writing. He may order the arrest of the accused and interrogate him as to his guilt. The evidence thus obtained is all written down and forms, when duly signed, the process verbal, which is then transmitted, with all the papers and documents in the case, to the *juge d'instruction*. The *juge d'instruction* from time to time reports his proceedings to a *chambre du conseil* composed of three magistrates, and if they are of opinion, when the whole case is before them, that the accused ought not to be prosecuted, they order him to be discharged; if they think he ought to be put upon his trial before a jury, the whole of the proceedings are transmitted to a higher court, known as the *cour royal*, who finally determine whether the accused ought or ought not to be put upon his trial before a jury. Some of the ablest of the French jurists deplore the absence in their country of a tribunal corresponding to our grand jury, and point out that the chief advantage to be derived from it would be the abolition of secret investigations, which are the disgrace of criminal trials in France.

To trace out carefully through the records of our criminal courts, from the earliest times, the beneficent influence exercised by the grand jury would be an interesting and useful undertaking. The iconoclast is abroad in the land, and forgetting in times of peace the lessons of history is ready to lay the axe to the root of every tree, but let us hope that this ancient and venerable oak, whose friendly branches have

afforded shelter and safety to many a storm-beaten traveler in the dark days that have gone by, may be spared. The millennium has not yet arrived, and we cannot spare a single institution which in the past in any measure safeguarded the liberties of the people. —*Neil McCrimmon*, in *Canadian Law Review*.

BOOK REVIEWS.

ROOD ON ATTACHMENTS, GARNISHMENTS, JUDGMENTS AND EXECUTIONS.

The impression that strikes the reader on his first introduction to Mr. Rood's new work on Attachments, Garnishments, Judgments and Executions, finds expression in the familiar proverb that "a jack of all trades is usually master of none." A closer acquaintance, however, will reveal one particular excellence, which is too much underestimated by the lawyer of to-day,—a thorough discussion of the principles of the law applicable to the particular questions treated. In this connection the words of the editor are interesting: "While this text states only the most elementary rules, it is believed that the man who has thoroughly mastered them can more than cope with one who is burdened with a weight of half-digested matter." There is a world of truth in this statement for the lawyer who desires the practice of his profession to be a pleasure rather than a drudgery, and to enjoy the confidence of the bar and the public. It would seem that in the group of subjects selected for this treatise would be found little that could be founded on principle and much less that could be interestingly discussed. An agreeable disappointment in this regard awaits the reader of these carefully written pages. Printed in one volume of 549 pages and bound in buckram. Published by George Wahr, Ann Arbor, Mich.

AMERICAN STATE REPORTS, VOL. 82.

The advent of every successive volume of the American State Reports constantly reminds us of the fact that the courts are still grinding out the law,—"lest we forget—lest we forget." It is, indeed, necessary, for where is the lawyer anywhere that would not like to "forget it." The pile of it is assuming bewildering and ridiculous proportions. In fact, one half of the reported cases are nothing but cumulative reiterations of legal truisms and, in some instances, evidence a most criminal lack of legal perception on the part of counsel who encourage the expense of such "will of the wisp" and unfounded litigation. Only three reasons suggest themselves,—either lawyers are too sanguine and unduly exhilerated with the chance of success, or else they do not know the law or the principles applicable to the facts of the case, or, a most unlikely alternative we trust, are too easily enamored of the opportunity to earn a fee. We believe the second suggestion covers the great majority of these cases. The young attorney is too eager for the fray to perfect a thorough knowledge of the principles of the law, and, in after years, finds neither the time nor inclination to regain the lost ground. Probably the best substitute and supplement to a proper acquaintance with the principles of the laws is to be found in a close study of current annotations now so abundant and accessible, such as appear regularly in the columns of the CENTRAL LAW JOURNAL, or in the frequent issues of the different annotated reports, such as the volume before us at this time,—the 82 American State Reports. Among the interesting annotations in this volume, which will repay careful study, we note the following: "Evidence Admissible as Bearing on the Credibility or Bias of a Witness," p. 25; "Liability of Notaries," p. 381; "What Covenants Run With Land," p. 664; "Judicial Notice of Localities and Boundaries," p. 430. Bound in one volume of 1,059 pages and published by the Bancroft Whitney Company, San Francisco, Cal.

BOOKS RECEIVED.

A Treatise on the Law of Attachments, Garnishments, Judgments and Executions. To which is appended a Collection of Leading and Illustrative Cases with Notes. For Lawyers and Students. By John R. Hood, an Instructor in Law at the University of Michigan, Author of "Rood on Garnishment," "Common Remedial Processes," etc. Geo. Wahr, Publisher and Bookseller, Ann Arbor, Mich. Buckram, p. 546, price, $3.00.

HUMORS OF THE LAW.

Edward L. Perkins, an able and brilliant member of the Philadelphia bar, launched the following story some years ago:

He was a new judge on the circuit, and when the counsel for the plaintiff called the counsel for the defendant a liar almost at the opening of the case, his honor promptly exclaimed:

"Gentlemen! Gentlemen! There must be no fussing in this court!"

The lawyers cooled off, but ten minutes later the counsel for the defendant took an exception and added:

"And I now brand the so called attorney who stands there as a robber and villain!"

"Order! Order!" shouted his honor, as he turned pale at the prospects of a tragedy. "If the gentlemen do not moderate their language I shall have to impose a fine."

The gentlemen moderated, but the counsel for the plaintiff had been hurt in his feelings and wanted to get even. The opportunity came, and, standing erect, with eyes flashing, he shouted:

"That man there—that being which calls itself a man—is not stating the truth and he knows it way down in his black heart!"

"This language must stop!" declared the judge, as he made ready to dodge bullets. "I have warned the gentlemen several times, and on the next occasion I shall impose a heavy fine."

The "gentlemen" subsided, and the case continued for ten or fifteen minutes. Then counsel for the plaintiff got hot and sprang to his feet and exclaimed:

"No one but a cur would say that, and I have a bullet here for a cur!"

"And it is my day for shooting skunks!" howled the counsel for the defendant, as he also placed his hand on his pistol pocket.

"Gentlemen—gentlemen—!"

"I defy him!"

"And I defy you!"

"Gentlemen," said the judge, as he slipped out of his chair to get the shelter of his desk, "I said I would impose a fine, but I've changed my mind. Go ahead and shoot to kill!"

Each lawyer simply let his hand fall, smiled at his opponent, then sat down in his chair, and the drinks were on the judge.—*Philadelphia Item.*

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3. ADULTERY—Subsequent Intercourse.—On a prosecution for adultery, evidence of acts of intercourse subsequent to that charged held admissible.—State v. More, Iowa, 88 N. W. Rep. 322.

4. ADVERSE POSSESSION — Five Years' Statute in Texas.—In trespass to try title the defense of five years limitation is not established, unless a continuity of claim under a sufficient deed, and record of the deeds forming a chain of title, is shown.—Lacky v. Bennett, Tex., 65 S. W. Rep. 651.

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7. ALIENS — Proving Right of Residence Under Chinese Exclusion Act.—Under Act May 5, 1892, the burden rests upon a person of the Chinese race, arrested for being unlawfully within the United States, to prove affirmatively his right to remain here.—United States v. Chun Hoy, U. S. C. C. of App., Ninth Circuit, 111 Fed. Rep. 899.

8. APPEAL AND ERROR—Evidence Contrary to Verdict.—Where the evidence is not conflicting, and is against the verdict, it should be reversed.—Idaho Mercantile Co. v. Kilanquin, Idaho, 66 Pac. Rep. 983.

9. APPEAL AND ERROR—Final Judgment.—An order refusing to enter a default against defendant is not a final judgment, and therefore cannot be reviewed on writ of error.—Brockway v. W. & T. Smith Co., Colo., 66 Pac. Rep. 1073.

10. APPEAL AND ERROR—Plea of Res Judicata.—Where all the facts to support a plea of *res judicata* are in the record, the plea may be filed in the supreme court.—State v. Alexander, La., 31 South. Rep. 60.

11. APPEAL AND ERROR—Presumption from Failure to Bring up all the Evidence.—When, on appeal, the bill of exceptions does not contain all the evidence, it will be presumed that the giving of the affirmative charge for defendant was warranted by other evidence.—Clardy v. Walker, Ala., 31 South. Rep. 78.

12. APPEARANCE—Motion to Set Aside Default.—Motion by a defendant to set aside a default judgment held a general appearance, which cured any irregularity in the service of process.—Thompson v. Alford, Cal., 66 Pac. Rep. 983.

13. ARSON—Evidence of Kerosene Odor.—Evidence of an odor of kerosene on defendant's clothing at the time of the fire is admissible in a prosecution for burning his property to defraud insurers, there being evidence that kerosene was used to burn the building.—People v. Bishop, Cal., 66 Pac. Rep. 976.

14. ASSIGNMENT FOR BENEFIT OF CREDITORS—Attorney's Fees.—A creditor who succeeds in an action to have a transfer made by the debtor declared an assignment for the benefit of creditors is entitled to an attorney's fee to be paid out of the estate.—Davis v. Feltman Co., Ky., 65 S. W. Rep. 615.

15. BANKRUPTCY—Claim of Bankrupt's Surety.—The claim of a surety of a bankrupt on a note proved in the bankruptcy proceedings by the creditor was barred by the discharge in bankruptcy.—Hayer v. Comstock, Iowa, 88 N. W. Rep. 351.

16. BANKRUPTCY—Jurisdiction of Controversy Between Trustee and Mortgagee.—The bankruptcy act does not confer upon a district court of the United States, as a court of bankruptcy, jurisdiction of a controversy between a trustee and mortgagee of the bankrupt to determine the validity of the mortgage, unless with the consent of such mortgagee.—*In re* San Gabriel Sanatorium Co., U. S. C. C. of App., Ninth Circuit, 111 Fed. Rep. 892.

17. BANKRUPTCY—Right of Seller to Rescind Sale and Recover Goods.—A seller of goods to an insolvent on credit, in reliance on a report of a mercantile agency furnished by the purchaser, which was false, held entitled to rescind the sale and recover the proceeds of the goods from the trustee in bankruptcy of the purchaser.—*In re* Weil, U. S. D. C., S. D. N. Y., 111 Fed. Rep. 897.

18. BANKRUPTCY—Silent Partners of Bankrupt.—To charge a person as a silent partner in the business of a bankrupt, so as to debar him of the rights of a creditor of the estate, where there has been no holding out as such, an actual agreement must be proved, binding on all the parties thereto.—*In re* Clark, U. S. D. C. D. Wash., 111 Fed. Rep. 893.

19. BANKS AND BANKING—Revocation of Check by Death.—The death of the drawer operates as a revocation of a check, so that, if the bank pays it after notice of that fact, it does so at its peril.—Weiland's Admr. v. State Nat. Bank, Ky., 65 S. W. Rep. 617.

20. CHATTEL MORTGAGES—After-Acquired Property.—Mortgage covering after-acquired property held subject to a subsequent purchase-money mortgage on property so subsequently acquired.—Hammel v. First Nat. Bank, Mich., 88 N. W. Rep. 397.

21. CONSTITUTIONAL LAW—What are Ex Post Facto Criminal Laws.—The amendment of Const. art. 2, § 12, authorizing prosecution for felonies by information, was not *ex post facto* as to offenses committed before it took effect.—State v. Kyle, Mo., 65 S. W. Rep. 763.

22. CONTEMPT—Ignoring Void Order.—The fact that the order in proceedings supplemental to execution was voidable does not relieve from contempt proceedings for a failure to comply therewith, where the court had jurisdiction of the proceedings at their inception.—State v. Downing, Oreg., 66 Pac. Rep. 917.

23. CONTRACTS—Effect of Illegal Stipulation.—An illegal stipulation in a contract which is entire in its nature will vitiate the whole contract.—Sims v. Alabama Brewing Co., Ala., 31 South. Rep. 35.

24. CONTRACT—Rescission Where Time is Not of the Essence.—Rescission of a contract of which time is not of the essence, on the ground of delay, will not be granted, in the absence of a showing that such delay was intentional, or that it has caused such damages as would render a decree for specific performance inequitable.—Reid v. Mix, Kan., 66 Pac. Rep. 1021.

25. CONTRACTS—Sufficiency of Consideration.—The

extension of time to a defaulting guardian in which to repay money converted held a sufficient consideration to support a bond given to secure such sum.—Union Trust Co. v. Zynda, Mich., 88 N. W. Rep. 407.

26. CORPORATIONS - De Facto Corporations.—Certificate of the secretary of a foreign state that intervener was duly incorporated held admissible to prove that intervener was at least a *de facto* corporation.—Petty v. Hayden, Iowa, 88 N. W. Rep. 389.

27. CORPORATIONS—Effect of Contracting With De Facto Corporation.—A person contracting with a *de facto* corporation exercising corporate functions will not be heard to deny the existence of such corporation in an action on the contract against its stockholders.—Owensboro Wagon Co. v. Bliss, Ala., 31 South. Rep. 81.

28. CORPORATIONS—Limitation on Stockholder's Liability.—Three-year statute of limitations (Gen. St. 1901, § 4446) held not to bar an execution on a court's order enforcing double liability of the stockholders of a corporation.—Wheeler v. Chenault, Kan., 66 Pac. Rep. 1010.

29. CORPORATIONS—Stockholders in De Facto Corporation.—Stockholders of a *de facto* corporation, not intending or agreeing to become partners, are not liable as partners for the corporation debts.—Owensboro Wagon Co. v. Bliss, Ala., 31 South. Rep. 81.

30. COSTS—Fees of Guardian Ad Litem.—Fees of a guardian *ad litem* held not costs, and therefore not chargeable against the unsuccessful party.—Prest v. Black, Kan., 66 Pac. Rep. 1017.

31. COUNTIES—Extra Compensation of Tax Collector.—Under Code 1888, § 5067, a county treasurer held not entitled to extra compensation for collecting taxes in townships which had failed to elect a collector.—Tracy v. Jackson County, Iowa, 88 N. W. Rep. 362.

32. COURTS—Continuance of Terms.—Where an order adjourning court provides that it be reconvened on Monday, December 4th, and held for two weeks, and nothing appears to the contrary, the term will be presumed to have ended on Saturday, December 16th.—Richter v. Koopman, Ala., 31 South. Rep. 32.

33 CRIMINAL EVIDENCE—Defendant Testifying in His Own Behalf.—A defendant may testify in his own behalf, though he may try to cast the guilt on his associates.—State v. Sims, La., 31 South. Rep. 71.

34. CRIMINAL EVIDENCE—Evidence of Previous Quarrels.—Evidence of a previous quarrel between deceased and other persons, at which defendant was not present and had no part, held irrelevant in a prosecution homicide.—State v. Nelson, Mo., 65 S. W. Rep. 749.

35. CRININAL EVIDENCE—Testimony at Preliminary Examination.—Testimony of a witness at a preliminary examinrtion cannot be used on trial, without showing his death or permanent absence.—State v. Banks, La., 31 South. Rep. 53.

36. CRIMINAL LAW—Proof to Convict Accessory.—To secure conviction of an accessory to murder after the fact, it need not be shown that the accused had actual knowledge of the facts tending to show the guilt of the principal.—Dent v. State, Tex., 65 S. W. Rep. 627.

37. CRIMINAL TRIAL—Plea of Former Jeopardy.—A trial before a judge, where a jury could not be waived, held not a basis for a plea of former jeopardy.—State v. Jackson, La., 31 South. Rep. 52.

38. CUSTOMS AND USAGES — Staking Ice.—A custom that staking ice on public waters was alone sufficient to constitute an appropriation thereof held void.—Becker v. Hall, Iowa, 88 N. W. Rep. 324.

39. DAMAGES—For Amputation of Foot.—A verdict of $15,000 held not excessive, where a railroad drawbridge tender, 37 years old, in good health and earning $50 per month, had one foot amputated and the other broken and painful.—Galveston, H. & N. Ry. Co. v. Newport, Tex., 65 S. W. Rep. 657.

40. DAMAGES—Mental Anguish.—An instruction allowing damages for future pain, mental anguish, etc., held not objectionable as authorizing damages which were merely possible.—Westercamp v. Brooks, Iowa, 88 N. W. Rep. 372.

41. DAMAGES—Mental Anguish.—A verdict of $750 held not excessive for mental anguish caused by failure to deliver a telegram.—Western Union Tel. Co. v. Giffin, Tex., 65 S. W. Rep. 661.

42. DAMAGES — Penalty or Liquidated Damages.—A stipulation, in a contract for the sale of cattle, for the payment by the seller of a certain sum per head for any shortage in the number delivered of a certain class, held one for a penalty, which a court of equity would not enforce.—Home Land & Cattle Co. v. McNamara, U. S. C. C. of App., Ninth Circuit, 111 Fed. Rep. 822.

43. DEEDS — Undue Influence of Clergyman.—A clergyman, who is a grantee in a deed from a parishioner, though deriving no benefit therefrom, has the burden of showing good faith in the transaction.—Good v. Zook, Iowa, 88 N. W. Rep. 376.

44. DESCENT AND DISTRIBUTION—Purchaser of Inheritance.—Purchaser of an heir's share of testator's land without notice held to take subject to an advancement from the deceased to such heir.—Russell v. Smith, Iowa, 88 N. W. Rep. 361.

45. DISMISSAL AND NONSUIT—Retention to Settle Disputes of Defendants.—Where an action is dismissed as to plaintiff, it cannot be retained to litigate questions between defendants in which plaintiff has no interest.—Long v. McGowan, Colo., 66 Pac. Rep. 1076.

46. DIVORCE—Collection of Alimony.—A petition for execution to collect alimony held properly dismissed, where defendant was not able to pay.—Jones v. Jones, Ala., 31 South. Rep. 91.

47. ELECTIONS—Failure to Keep Polls Open.—Failure to keep polls open during the hours provided by statute held not to render ballots illegal.—Patton v. Watkins, Ala., 31 South. Rep. 93.

48. ELECTIONS — Recount of Ballots.—The fact that the ballots of a single township or a precinct of a county cannot be received in an election contest will not prevent a recount of the ballots of the other townships or precincts.—Brown v. Crosson, Iowa, 88 N. W. Rep. 366.

49. EMINENT DOMAIN — Cost of Fences in Laying Out Road.—Where land is not enhanced in value by the laying out of a road over it, the owner is entitled to the cost of fences necessitated by the road.—Anderson v. Wharton County, Tex., 65 S. W. Rep. 643.

50. EMINENT DOMAIN — Proving Necessity.—In proceedings to condemn land for a street, the burden of proof as to its necessity is on the municipality.—Minneapolis & St. L. R. Co. v. Village of Hartland, Minn., 88 N. W. Rep. 428.

51. EQUITY—Findings.—Findings of jury in equitable cases are advisory only, and may be set aside or adopted in whole or in part.—Wood v. Turbush, Kan., 66 Pac. Rep. 991.

52. ESTOPPEL—Proof of Estoppel in Pais.—An estoppel *in pais*, in order to be available, must be pleaded and proven.—Chapman v. Hughes, Cal., 66 Pac. Rep. 982.

53. EVIDENCE — Declarations Against Interest.—Where assured stood *in loco parentis* to his sister, his declarations as to a gift to her of a policy payable to his estate held admissible as against interest.—Lord v. New York Life Ins. Co., Tex., 65 S. W. Rep. 699.

54. EVIDENCE—Docket Entries of County Commissioners.—Entry in a docket kept by county commissioners for their convenience held inadmissible when not made by judge of probate by order of such county commissioners.—Goggins v. Myrick, Ala., 31 South. Rep. 22.

55. EVIDENCE—Judicial Records.—A judicial record, for the making of which the law provides, makes full proof of itself.—State v. Banks, La., 31 South. Rep. 53.

56. EVIDENCE — Memorandum of Contract.—Memorandum of executory contract for delivery of goods,

made by bookkeeper in accordance with seller's instructions, in the absence of the purchaser, held not admissible in evidence against the purchaser.—J. Snow Hardware Co. v. Loveman, Ala., 31 South. Rep. 19.

57. EXCEPTIONS, BILL OF—When Bill Must be Signed.—Failure of presiding judge to sign a bill of exceptions until after an appeal is not sufficient ground for striking such bill from the record.—Capital City Ins. Co. v. Confield, Ala., 31 South. Rep. 37.

58. EXCEPTIONS, BILL OF—When Bill Must be Signed.—A bill of exceptions, not signed until the day after statutory period, is insufficient as a basis for assignment of error.—Richter v. Koopman, Ala., 31 South. Rep. 32.

59. EXECUTION—Possession as Evidence of Title.—Mere possession of property by a bailee is not sufficient evidence of title thereto to protect a judgment debtor of the bailee levying on the property, as against the owner thereof.—Gaar, Scott & Co. v. Nichols, Iowa, 88 N. W. Rep. 382.

60. EXECUTION — Supplemental Proceedings.—A judgment creditor is not required to levy on and sell tangible property of the judgment debtor before invoking the aid of supplemental proceedings.—State v. Downing, Oreg., 66 Pac. Rep. 917.

61. EXECUTORS AND ADMINISTRATORS—After-Discovered Assets.—Where, after an administrator has been duly discharged, assets belonging to the estate and which have not been administered are discovered, the former administration cannot be revived, but the court will appoint an administrator *de bonis non*.—Ratliff v. Magee, Mo., 65 S. W. Rep. 713.

62. EXECUTORS AND ADMINISTRATORS—Interest of Vendor in Land Sold on Condition.—The interest of a vendor in land held by the vendee under a contract of purchase, on death of the vendor, goes to the administrator, and is not subject to sale on execution against the heir.—Bowen v. Lansing, Mich., 88 N. W. Rep. 384.

63. EXECUTORS AND ADMINISTRATORS — Situs of Choses in Action.—Choses in action, owned by a nonresident and in his possession at the time of his death at his domicile, have their *situs* for purposes of administration within the state where the debtor resides, and not at the domicile of the owner.—Murphy v. Crouse, Cal., 66 Pac. Rep. 97.

64. FALSE PRETENSES—Proof of Benefit to the Accused.—It is not an element of the offense of obtaining property by false pretenses that the property was obtained for the benefit of the person making the pretenses.—State v. Balliet, Kan., 66 Pac. Rep. 1005.

65. FIRE INSURANCE — Inurement.—Mortgagee of personalty held not entitled to proceeds of insurance which donee thereof had effected to protect her own interest.—Shadgett v. Phillips & Crew Co., Ala., 31 South. Rep. 20.

66. FORGERY—Unexplained Possession of Forged Instrument.—Where defendant was on trial, charged with having possession of a forged deed with intent to defraud by uttering it, it was error to charge that, if the deed was found to be a forgery, the unexplained possession was evidence tending to prove his possession was with knowledge of its false character and for an unlawful purpose.—State v. Hathhorn, Mo., 65 S. W. Rep. 756.

67. FRAUDS, STATUTE OF—Agreement to Will Property.—A parol agreement to will property held not to have been taken out of the statute of frauds by part performance.—Richardson v. Orth, Oreg., 66 Pac. Rep. 925.

68. FRAUDULENT CONVEYANCES—Defense of Other Remedies.—It is no objection to a bill to subject property fraudulently conveyed to a judgment that the creditor has a remedy at law by garnishment or otherwise.—Guyton v. Terrell, Ala., 31 South. Rep. 83.

69. FRAUDULENT CONVEYANCES — Defrauding Future Creditors.—A deed of gift, fraudulent in its inception, and made with intent to defraud future creditors, is void as to such creditors.—Bush & Mallett Co. v. Helbing, Cal., 66 Pac. Rep. 967.

70. FRAUDULENT CONVEYANCES — Land Purchased With Wife's Money.—Conveyance by husband of land bought with wife's money held fraudulent as to creditors, who loaned to him on faith of his ownership.—Sears v. Davis, Oreg., 66 Pac. Rep. 913.

71. GAS — Power to Grant Exclusive Privileges.—Under Rev. St. 1889, § 1519, expressly giving power to city councils to give the exclusive privilege of erecting gas works and furnishing gas to light the streets and alleys in their city, the consent of the people of a city to such franchise was not required.—Lawrence v. Hennessy, Mo., 65 S. W. Rep. 717.

72. GIFTS—Choses in Action.—The provision of the Revised Statutes requiring possession to accompany a gift of goods or chattels does not apply to a gift of a chose in action.—Lord v. New York Life Ins. Co., Tex., 65 S. W. Rep. 699.

73. GRAND JURY — Right to Challenge Array.—One bound over to await action of a grand jury held to have a common law right to challenge the array or the polls.—People v. District Court of Second Judicial District, Colo., 66 Pac. Rep. 1068.

74. GUARDIANS — Appeal from Order to Pay Claim.—The guardian of an insane person has a right to appeal from an order directing him to pay a disputed claim against the estate of his ward.—*In re* Breslin's Estate, Cal., 66 Pac. Rep. 962.

75. HIGHWAY—Determination of Public Necessity.—Determination of municipality that a highway over a right of way is a public necessity and will not essentially impair the use of such right of way will be set aside only when the evidence is conclusive.—Minneapolis & St. L. R. Co. v. Village of Hartland, Minn., 88 N. W. Rep. 423.

76. HOMESTEAD—Daughter of 18 Dependent on Father.—A daughter 18 years old, living with the father, held dependent upon him for support, though physically able to earn her own living.—Lyons v. Andry, La., 31 South. Rep. 38.

77. HOMESTEAD — Extinguishment of Homestead by Rental.—Where the owner erects houses on lots adjacent to his residence, fences them off, and rents them, they are no longer part of his homestead.—Wurzbach v. Menger, Tex., 65 S. W. Rep. 679.

78. HOMESTEAD — Husband's Right of Waiver.—Where the husband and wife have joined in executing a lien on the homestead, the husband cannot waive her rights or extend the lien by any act in which she does not join.—San Antonio Real Estate Bldg. & Loan Assn. v. Stewart, Tex., 65 S. W. Rep. 665.

79. HOMESTEAD — Rights of Widower Without Dependents.—Where a debtor acquired the right to the homestead by the occupancy of land with his family, he did not lose the right by the death of his wife and the marriage of his children, as he continued to live on the land with his sister.—Davis v. H. Feltman Co., Ky., 65 S. W. Rep. 615.

80. HOMESTEAD—Widow Without Dependents.—A widow who acquries land after her husband's death loses her homestead right therein when all those depending on her leave her domicile.—Gaar, Scott & Co. v. Wilson, Iowa, 88 N. W. Rep. 332.

81. HUSBAND AND WIFE — Note of Married Woman.—Under Rev. St. 1889, §§ 6864, 6869, a married woman may give valid deed of trust to secure her note, without her husband joining therein.—Farmers' Exch. Bank v. Hageluken, Mo., 65 S. W. Rep. 728.

82. HUSBAND AND WIFE—Support of Wife in Equity.—Equity will, in a proper case, enforce in favor of the wife a claim for her support out of the estate of her husband, independently of proceedings for a divorce.—Pearce v. Pearce, Ala., 31 South. Rep. 85.

83. HUSBAND AND WIFE—Wife's Recovery for "Loss of Time" from Injury.—In an action for personal in-

juries by a married woman, who followed no separate employment, instruction enumerating among the elements of damage to be considered "the time she was disabled" held erroneous.--Elenz v. Conrad, Iowa, 88 N. W. Rep. 337.

84. HUSBAND AND WIFE—Wife's Recovery for Medical Services.—In an action for personal injuries by a married woman, who followed no separate employment, it was error to allow a recovery for medical services.—Elenz v. Conrad, Iowa, 88 N. W. Rep. 337.

85. INDICTMENT AND INFORMATION—Filed in Vacation.—An information is not invalid under the common law because filed in vacation.—State v. Kyle, Mo., 65 S. W. Rep. 763.

86. INFANTS — Laches.—An infant, against whom a judgment was rendered in a civil suit, where no guardian was appointed in his behalf, who for seven years, took no step to set aside the judgment, held barred by laches.—Schimpf v. Rohnert, Mich., 88 N. W. Rep. 384.

87. INJUNCTION — Action on Bond.—Want of jurisdiction to issue injunction held no defense in an action on bond.—City of Boise City v. Randall, Idaho, 66 Pac. Rep. 938.

88. INJUNCTION — Enjoining Enforcement of Penal Ordinances.—Courts can enjoin the enforcement of ordinances relating to public order, though penal in their nature.—McFarlain v. Town of Jennings, La., 31 South. Rep. 62.

89. INSANE PERSONS — Appointment of Conservator Without Notice to Lunatic.—Where an order appointing a conservator of a lunatic is made under 2 Mills' Ann. St. § 2935, without notice to the lunatic, it should be set aside.—Jones v. Learned, Colo., 66 Pac. Rep. 1071.

90. INSURANCE—Inurement of Insurance on Mortgaged Property.—Insurance on mortgaged property taken by purchaser at foreclosure sales does not inure to the benefit of the person entitled to redeem.—Deming Inv. Co. v. Dickerman, Kan., 66 Pac. Rep. 1029.

91. INSURANCE—Waiving Proofs of Loss.—An absolute denial by the insurer of liability was a waiver of proofs of loss.—Germania Ins. Co. v. Ashby, Ky., 65 S. W. Rep. 611.

92. JUDGMENT—Action to Cancel is a Direct Attack.—Action to cancel judgment for lack of jurisdiction by reason of a failure to serve summons held a direct attack on such judgment.—Phelps v. McCollam, N. Dak., 88 N. W. Rep. 292.

93. JUDGMENT—Vacation of Default Judgment.—Judgment by default having been vacated on motion of defendant, the grounds therefor held to entitle plaintiff to a vacation of such defendant's default, in the absence of a showing of prejudice to defendant's rights.—Thompson v. Alford, Cal., 66 Pac. Rep. 983.

94. JUSTICE OF THE PEACE — Appeal Bond.—An appeal bond in justice court, which is signed only by the appellants, is insufficient to give the district court jurisdiction.—Minton v. Ozias, Iowa, 88 N. W. Rep. 336.

95. LANDLORD AND TENANT — Acceptance of Rent from Sublessee.—In an action for a balance due on a lease which contained a clause against subletting, it was no defense that the lessee sublet without consent and the lessor accepted rent from the sublessee.—Brosnan v. Kramer, Cal., 66 Pac. Rep. 979.

96. LANDLORD AND TENANT—Adverse Possession by Sublessee.—A person assisting the lessee of a farm cannot deprive him of his right of possession by giving up possession to an adverse claimant during the temporary absence of the lessee.—Stewart v. Miles, Mo., 65 S. W. Rep. 754.

97. LANDLORD AND TENANT — Damages for Wrongful Holding Over.—The yearly rental value of farm lands furnishes the proper basis on which to estimate the damages occasioned by the wrongful holding over of the lessee.—Butterfield v. Kirtley, Iowa, 88 N. W. Rep. 371.

98. LANDLORD AND TENANT — Lien on Crop.—A landlord has a statutory lien on the crop, and may maintain replevin for the whole crop against an execution creditor of the tenant.—Dale v. Taylor, Kan., 66 Pac. Rep. 993.

99. LANDLORD AND TENANT — Lien on Crop.—Unpaid rent is a lien on corn grown and remaining on the rented premises, independent of attachment proceedings therefor.—Wester v. Long, Kan., 66 Pac. Rep. 1032.

100. LANDLORD AND TENANT — Restitution After Tenant Holds Over.—Where a tenant holds over two years under a verbal lease, the landlord may have restitution of the premises at the end of such time without giving a year's notice to quit.—Ryan v. Mills, Mich., 88 N. W. Rep. 392.

101. LANDLORD AND TENANT—Unsuitability of Leased Premises.—Where leased premises were unsuitable for the purpose for which they were rented, the lessee held entitled to abandon and have cancellation of the lease.—Piper v. Fletcher, Iowa, 88 N. W. Rep. 380.

102. LIFE INSURANCE—Notice of Prior on Second Application.—A life insurance company, on a second application for insurance, is not bound to take notice of what was contained in a prior application.—Rhode v. Metropolitan Life Ins. Co. Mich., 88 N. W. Rep. 400.

103. LIFE INSURANCE—Right of One Advancing Dues.—Under contract whereby defendant advanced money to pay the dues on a husband's life insurance, held, he was entitled to one half of amount payable to widow.—Crenshaw v. Collier, Ark., 65 S. W. Rep. 709.

104. LIFE INSURANCE — Statements of Examining Physician.—In an action on a life insurance policy, the statement of examining physician as to insured's then physical condition is admissible in evidence.—Rhode v. Metropolitan Life Ins. Co., Mich., 88 N. W. Rep. 400.

105. LIFE INSURANCE—"Voluntary Exposure."—That insured was standing on the step of a moving railway passenger car, holding onto the railings with both hands, when he fell, did not show "voluntary exposure to unnecessary danger," within an exemption of liability contained in the policy.—Smith v. Ætna Life Ins. Co., Iowa, 88 N. W. Rep. 368.

106. LIMITATION OF ACTIONS—Against Remainderman.—Limitations for recovery of real property do not commence to run against the remainder-man until the death of the life tenant.—Hall v. French, Mo., 65 S. W. Rep. 769.

107. LIMITATION OF ACTIONS—Bonds Payable on Demand.—Where money which is the subject-matter of bond is payable on demand, limitations do not run until demand made.—Portner v. Wilfahrt, Minn., 88 N. W. Rep. 418.

108. LIMITATION OF ACTIONS—Payment as New Promise.—A payment made by one joint maker of a note does not operate as a new promise, which will interrupt the running of limitations against the other joint maker.—Grovenor v. Signor, N. Dak., 88 N. W. Rep. 278.

109. LIMITATION OF ACTION—Several Notes Becoming Due When One is Unpaid.—Where a lien securing notes provides that when three matured notes are unpaid all shall become due, limitations commence to run against all the notes as soon as three are past due.—San Antonio Real Estate Building & Loan Assn. v. Stewart, Tex., 65 S. W. Rep. 665.

110. LIS PENDENS—Order of After New Trial.—The new trial authorized by Rev. St. art. 1375, is a continuation of the original suit; and the title of purchasers on execution under the judgment and those claiming under them falls with the setting aside of the judgment.—Glaze v. Johnson, Tex., 65 S. W. Rep. 662.

111. MANDAMUS—Taxation of Costs Against County.—Where the justices of a county court have refused to draw a warrant to pay a bill of costs taxed against the county, *mandamus* will issue to compel the issuance of such warrant.—State v. Fraker, Mo., 65 S. W. Rep. 720.

112. MANDAMUS—To Permit District Attorney to Represent State.—Where magistrate denied right to dis-

trict attorney to represent the state in his court on a trial for assault, it may be enforced by *mandamus*.—State v. Brown, La., 31 South. Rep. 50.

113. MASTER AND SERVANT—Failure to Inspect Appliances.—The failure of a railroad company to make a reasonable inspection of an appliance furnished an employee will constitute negligence in the company, though the duty of inspection was committed to a servant.—Galveston, H. & S. A. Ry. Co. v. Buch, Tex., 65 S. W. Rep. 681.

114. MASTER AND SERVANT—Failure to Remedy Defects.—Failure of a master to remedy defects in a machine, by which a servant is injured, held negligence.—Ladonia Cotton Oil Co. v. Shaw, Tex., 65 S. W. Rep. 693.

115. MASTER AND SERVANT—Furnishing Safe Place to Work.—Failure to furnish a reasonably safe place for a servant to work, though with the servant's knowledge, does not make the danger arising therefrom a risk assumed by the servant.—Wendler v. People's House Furnishing Co., Mo., 65 S. W. Rep. 737.

116. MASTER AND SERVANT—Negligence of Acting Foreman.—Negligence of one acting as a foreman, solely at the request of regular foreman, held not negligence for which the master could be held liable.—Boyd v. Indian Head Mills, Ala., 31 South. Rep. 80.

117. MASTER AND SERVANT—Servant's Duty of Inspection.—A locomotive engineer is not charged with the duty of inspecting his engine for dangerous defects, though furnished with tools to make repairs during trips.—San Antonio & A. P. Ry. Co. v. Lindsey, Tex., 65 S. W. Rep. 668.

118. MECHANICS' LIENS—Necessity of Itemizing.—Under Rev. St. art 3296, an account filed to fix a mechanic's lien not itemized, but merely referring to the goods as furnished by contract, held insufficient—Meyers v. Wood, Tex., 65 S. W. Rep. 671.

119. MINES AND MINERALS—Location of Claim.—A location of a mining claim, posted upon a discovery within the limits of a valid, existing location previously made by the same locator, held void.—Reynolds v. Pascoe, Utah, 66 Pac. Rep. 1064.

120. MORTGAGES—Counsel Fees on Foreclosure.—An allowance of counsel fees for the foreclosure of a mortgage cannot be made by the supreme court in the first instance.—Fender v. Robinson, Cal., 66 Pac. Rep. 969.

121. MORTGAGES—Extension of Right to Redeem.—Where a purchaser is allowed a certain time to redeem, he will be relieved in equity when prevented from doing so by fraud, accident, or mistake.—Stephenson v. Kilpatrick, Mo., 65 S. W. Rep. 773.

122. MORTGAGES—Subsequent Mortgagee's Right to Redeem.—The right to challenge a subsequent mortgagee's right to redeem rests with the owners of the sheriff's certificates of sale only, and they waive any right to object by receiving and retaining the redemption money.—McDonald v. Beatty, N. Dak., 88 N. W. Rep. 281.

123. MUNICIPAL CORPORATIONS—Bonds Exceeding City's Limit of Taxation.—Where the rate of taxation is limited by the constitution, a purchaser of bonds of a city is required to take notice if such limit was reached before the bonds were issued.—Peck v. City of Hempstead, Tex., 65 S. W. Rep. 653.

124 MUNICIPAL CORPORATIONS—Illegal Issuance of Bond.—Where petition to village to issue bonds was not signed by the requisite number of voters and freeholders in the village, the issuance of the bond will be restrained.—Hamilton v. Village of Detroit, Minn., 88 N. W. Rep. 419.

125. MUNICIPAL CORPORATIONS—Notice of Defect in Sidewalk.—Where, in an action for injury resulting from a hole in a sidewalk, there is no evidence that the city had notice of the defect, or that it existed prior to the accident, negligence on the part of the city is not shown.—City of Boulder v. Weger, Colo., 66 Pac. Rep. 1070.

126. MUNICIPAL CORPORATIONS—Ordinance Against Keeping Jackass.—Under Sand. & H. Dig. §§ 5132, 5145, 5147, a town may enact an ordinance prohibiting the keeping of a jackass within its limits or in hearing distance of its populace.—*Ex parte* Foote, Ark., 65 S. W. Rep. 706.

127. MUNICIPAL CORPORATIONS—Right to Take Census—Municipal corporations held authorized ty take census, in order to determine the power to pass ordinances limited to cities of certain size.—McFarlain v. Town of Jennings, La., 31 South. Rep. 62.

128. NAVIGABLE WATERS—Building Wharfs.—Hill's Ann. Laws Oreg. § 4228, does not empower a town to authorize a riparian owner to extend his wharf in front of the lands of an adjoining riparian owner.—Montgomery v. Shaver, Oreg., 66 Pac. Rep. 923.

129. NAVIGABLE WATERS—Staking Banks of Stream.—Staking the banks of a stream before it has frozen, or marking or cleaning ice of insufficient thickness for harvesting, held not a legal appropriation of the ice.—Becker v. Hall, Iowa, 88 N. W. Rep. 324.

130. NEGLIGENCE—Burden of Proving Contributory Negligence.—It is the well-settled in the courts of the United States that the burden of proving contributory negligence in an action by a servant for a personal injury rests upon the defendant.—Baltimore & O. R. Co. v. Burris, U. S. C. C. of App., Sixth Circuit, 111 Fed. Rep. 882.

131. NEGLIGENCE—Imputable Negligence of Driver of Vehicle.—Husband and wife, returning from church together, held not engaged in a common enterprise so that his negligence will affect her right to recover for injuries from a defective walk.—Bailey v. City of Centerville, Iowa, 88 N. W. Rep. 379.

132. NEW TRIAL—Ground of New Evidence.—Where the application for a new trial does not show that proper diligence was used to discover the new evidence, an order denying the application will not be disturbed.—Galveston, H. & N. Ry. Co. v. Newport Tex., 65 S. W. Rep. 657.

133 NEW TRIAL — Newly-Discovered Evidence.—Where newly-discovered evidence consists wholly of admissions by plaintiff to third persons, an order denying a new trial will be sustained.—Jones v. Tucker, Ala., 31 South. Rep. 21.

134. PARTNERSHIP—Contracts of Co-Partners for the Firm.—Contracts of a partner within the apparent scope of the partnership business held binding on the firm, whether partners dealt fairly with each other or not.—Salt Lake City Brewing Co. v. Hawke, Utah, 65 Pac. Rep. 1058.

135. PARTNERSHIP — Declarations of Partners as Proof of Relation.—The declaration of one partner, not made in the presence of his co-partner, is inadmissible to prove the existence of the partnership.—Owensboro Wagon Co. v. Bliss, Ala., 31 South. Rep. 81.

136. PARTNERSHIP—Holding Out as Partner.—A person may estop himself from denying partnership liability by holding himself out, or by negligently permitting another to hold him out, as a partner, though no partnership exists in fact.—Rider v. Hammell, Kan., 66 Pac. Rep. 1026.

137. PARTNERSHIP — Ratification of Trust Deed.—A partner who ratifies a trust deed of the firm property executed by his co-partner cannot afterwards object to its validity because such partner is scheduled as a creditor therein.—Allen v. Meyer, Tex., 65 S. W. Rep. 645.

138. PATENTS — Degree of Utility.—The degree of utility of a patented article does not affect the question of patentability, nor does the length of time it will last and continue useful; but, if it is useful at all, that is sufficient to sustain the patent.—International Tooth Crown Co. v. Hanks Dental Assn., U. S. C. C., S. D. N. Y., 111 Fed. Rep. 916.

139. PAYMENTS — Application by Creditor.—Application of payments, for which no indorsements were

made, to notes other than the one in suit, held erroneous, where other payments made during the same time had been indorsed on such a note.—Estes v. Fry, Mo., 65 S. W. Rep. 741.

140. PRESUMPTIONS—Unfavorable Presumption from Failing to Testify.—Where party charged with fraud in an action fails to testify, an unfavorable presumption arises against him.—Stephenson v. Kilpatrick, Mo., 65 S. W. Rep. 773.

141. PRINCIPAL AND AGENT—Expenditures Occurring Because of Agent's Negligence.—An agent held not entitled to reimbursement for advances and expenditures rendered necessary by reason of his own failure to exercise reasonable diligence in the conduct of the agency.—Veltum v. Koehler, Minn., 88 N. W. Rep. 432.

142. PRINCIPAL AND SURETY—Release Because of Extension.—Surety held not released because of extension of time given his principal, where creditor expressly reserves remedies against surety.—Dean v. Rice, Kan., 66 Pac. Rep. 992.

143. PROCESS—Service on Wife Where Husband Had Left the State.—Substituted service of process on a husband by leaving copy with wife at the dwelling house of a neighbor, the husband having permanently left the state, held insufficient.—Phelps v. McCollam, N. Dak., 88 N. W. Rep. 292.

144. PROHIBITION—When Writ Lies.—The writ of prohibition only lies when some lower tribunal is acting without jurisdiction, or in excess of its jurisdiction, and there is no adequate remedy at law.—People v. District Court of Second Judicial District, Colo., 66 Pac. Rep. 1068.

145. PUBLIC LANDS — Collateral Attack of Patent.—Patent from land department held impervious to collateral attack for errors of law as well as mistakes of fact.—Kings v. McAndrews, U. S. C. C. of App., Eighth Circuit, 111 Fed. Rep. 860.

146. RAILROADS—Burden of Proof for Killing Live Stock.—Under Acts 1886, No. 70, owner of stock killed on railroad need not prove negligence.—State v. Foster, La., 31 South. Rep. 57.

147. RAILROADS — Establishment of a Private Railroad.—Establishment of a private railroad cannot be aided by the power of eminent domain.—Maginnis v. Knickerbocker Ice Co., Wis., 88 N. W. Rep. 300.

148. RAILROADS—Statutory Right to Recover Attorney's Fees.—The statutory right to recover attorney's fees in an action against a railroad for property destroyed by fire negligently set out by it depends on the right of the plaintiff to recover in the general action, and is not an independent cause of action.—St. Louis & S. F. Ry. Co. v. Ludlum, Kan., 66 Pac. Rep. 1045.

149. RAILROADS — Trespasser on Track.—Plaintiff, while walking along the cross-ties of the track, cannot complain that the train men were guilty of negligence in failing to give signals of approach.—Mizzell v. Southern Ry. Co., Ala., 31 South. Rep. 86.

150. RECORDS—Wrongful Retention.—The method or motive through which the court's attention was directed to the wrongful retention of certain papers from the files is immaterial, since it could proceed on its own motion to have them restored.—Howes v. Mutual Reserve Fund Life Assn., Iowa, 88 N. W. Rep. 338.

151. REFERENCE—Filing Exceptions.—It was error to confirm a commissioner's report on the same day on which it was filed, as a reasonable opportunity should have been given the parties to file exceptions.—Equitable Loan & Investment Co. v. Smith, Ky., 65 S. W. Rep. 609.

152. REFERENCE — Setting Aside Reference.—Code 1880, § 3295, providing that the report of referees may be set aside, and the matter again referred to the same or other referees, relates only to partition, and does not govern references of actions for trial.—Tufts v. Norris, Iowa, 88 N. W. Rep. 367.

153. REGISTRATION—Probate Records as Notice.—Probate records, showing a claim of title to land by a stranger to the record title, held not constructive notice to one who claims in the record chain of title.—Prest v. Black, Kan., 66 Pac. Rep. 1017.

154. REPLEVIN—Against Co Tenant.—Tenant in common held not entitled to maintain replevin for the common property against his co tenant, nor against one in possession as joint agent of the tenants in common.—Smith-McCord Dry Goods Co. v. Burke, Kan., 66 Pac. Rep. 1036.

155. SALES—Damages for Failing to Deliver.—Where defendant failed to but did not refuse to make delivery until some time later, the breach of the contract occurred at the time of the refusal, for the purpose of fixing the measure of damages.—Ralli v. Rockmore, U. S. C. C., N. D. Ga., 111 Fed. Rep. 874.

156. SALES—Subsequent Shipments After Refusal of Vendee.—In an action for breach of contract, consisting in defendant's failure to accept telegraph poles purchased of plaintiff, held, that plaintiff was not required to continue to ship poles after defendant's refusal to accept the same.—Berthold v. St. Louis Electric Const. Co., Mo., 65 S. W. Rep. 784.

157. SCHOOL AND SCHOOL DISTRICTS—Contractor's Right Where Bill Exceeds Constitutional Indebtedness.—That contract with a school district, which increases its indebtedness beyond the constitutional limitation, is not severable, will not defeat contractor's right to enforce the contract within the constitutional limitation.—McGillivray v. Joint School Dist. No. 1, Wis., 88 N. W. Rep. 310.

158. SEAMEN—Validity of Release.—A release executed before a shipping commissioner on a settlement and discharge of seamen, in conformity to Rev. St. § 4552, is conclusive on the parties, in the absence of fraud or coercion.—Pettersson v. Empire Transp. Co., U. S. C. C. of App., Ninth Circuit, 111 Fed. Rep. 931.

159. SET-OFF AND COUNTERCLAIM—Partnership and Individual Debts.—Under Code, § 3728, held, that a partner, sued individually for a partnership debt, cannot set off a debt owned by the partnership.—Drennen v. Gilmore, Ala., 31 South. Rep. 90.

160. SHERIFFS AND CONSTABLES — Contradicting Return.—A sheriff's return on an execution cannot be contradicted by him in a collateral action on his official bond.—Breckenridge Mercantile Co. v. Bailif, Colo., 66 Pac. Rep. 1079.

161. SHERIFFS AND CONSTABLES—Suspension by Governor.—The power of a governor to suspend a sheriff during investigation involves the exercise of discretion and good judgment by the governor.—State v. Megaarden, Minn., 88 N. W. Rep. 412.

162. SHIPPING—Oral Representations of Shipper as to Speed.—Representations made by a shipowner, prior to a charter, respecting the speed of his vessel, but which are not embodied in the charter, are superseded by that instrument, in the absence of fraud or mutual mistake.—Matthias v. Beeche, U. S. D. C., E. D. N. Y., 111 Fed. Rep. 940.

163. STATES—Breach of Contract of Purchase.—In an action by the financial agent of the state penitentiary on notes given in settlement of purchases, held, that the defense of a breach of the contract of purchase was not an action against the state.—Rice v. Dickson Car Wheel Co., Tex., 65 S. W. Rep. 645.

164. STATUTES — Changing Punctuation.—The supreme court, in the construction of a clause or sentence in the statute, which is ungrammatical and not so punctuated as to make sense, may change the punctuation and capitalization to carry out legislative intent.—State v. Deuel, Kan., 66 Pac. Rep. 1037.

165. SUBROGATION—Property Subject to Mortgage and Judgment.—Parties purchasing realty subject to mortgage and judgment, and paying mortgage, held

not entitled to be subrogated to the mortgage on sale of property at execution under the judgment.—Hargis v. Robinson, Kan., 66 Pac. Rep. 988.

166. TAXATION — Assessment of Franchises.—In assessing the taxes of a telegraph company existing under the laws of another state, the board of equalization properly took into consideration its franchise, together with the actual cost of its tangible property. —State v. Western Union Tel. Co., Mo., 65 S. W. Rep. 775.

167. TAXATION—Taxable Property of Insurance Companies.—Comp. Laws, § 3834, providing that the taxable property of insurance companies shall be computed by deducting the value of taxable real estate from its net assets above liabilities, as shown by the report of the commissioner of insurance, is not in conflict with Const. art. 14, § 11.—Michigan Mut. Life Ins. Co. v. Hartz, Mich., 88 N. W. Rep. 405.

168. TAXATION—Void Tax Sales.—A sale for taxes which have been paid confers no title on the purchaser. —Hake v. Lee, La., 31 South. Rep. 54.

169. TELEGRAPHS AND TELEPHONES — Damages for Failure to Deliver Telegram.—Father held not entitled to damages for mental anguish caused by failure to deliver message, whereby a brother-in law was prevented from being present at the death of a daughter. —Western Union Telegraph Co. v. Ayers, Ala., 31 South. Rep. 78.

170. TRIAL AND PROCEDURE—Defense of Former Suit Pending.—The defense of a former suit pending must be raised by a verified plea in abatement, and not by a motion to quash the proceedings.—Ryan v. Mills, Mich., 88 N. W. Rep. 392.

171. TRIAL AND PROCEDURE — Special Findings. — Where special findings and general verdict are inconsistent, the special findings are the verdict.—Garth v. Board of Comrs. of Edwards County, Kan., 66 Pac. Rep. 999.

172. TROVER AND CONVERSION—Measure of Damages. —If property converted be returned, the measure of the defendant's liability is the difference between the market value when taken and the market value when returned, with interest.—Prinz v Moses, Kan., 66 Pac. Rep. 1009.

173. TRUSTS—Beneficiaries Bound by Stipulation of Trust Deed.—Beneficiaries in a trust deed, claiming title to the land by virtue of its recitals, are bound by its other conditions, and cannot repudiate a stipulation therein that the trustee shall have power to sell the property.—Kahle v Stone, Tex , 64 South. Rep. 623.

174. USURY—Recovery of Usury Paid.—A defendant who has paid a judgment may recover usury embraced therein, though the defense that the claim sued on embraced usury was available in the original action.— Equitable Loan & Investment Co. v. Smith, Ky., 65 S. W. Rep. 609.

175. USURY—Recovery of Usury Paid.—Where defendant paid an attorney's fee stipulated for in a mortgage and erroneously allowed, he cannot recover the amount as usury paid, as it was a penalty merely, and not usury.—Equitable Loan & Investment Co. v. Smith, Ky., 65 S. W. Rep. 609.

176. WATERS AND WATER COURSES—Flowing Waste Water as Natural Stream.—Waters flowing through a tunnel derived from drainage, pumpings, and a waste weir of electrical machinery, do not constitute a natural stream, and are not subject to appropriation. —Cardelli v Comstock Tunnel Co., Nev., 66 Pac. Rep. 950.

177. WATER COMPANIES—Requiring Payment in Advance.—A water company, though exercising *quasi* public functions, may reasonably require payment in advance by the consumer, and enforce the requirement by cutting off the supply for non-compliance therewith.—Hieronymus v. Bienville Water Supply Co., Ala., 31 South. Rep. 31.

178. WILLS—Devise During Widowhood.—Will construed, and held, that a widow under a devise to her so long as she remained testator's widow, etc., took only an estate limited on her remarriage, and not a fee.—Shaw v. Shaw, Iowa, 88 N. W. Rep. 327.

179. WILLS—Evidence as to Testator's Dislikes.— Where the meaning of a will can be gathered from the instrument itself, declarations of testatrix, showing her feelings towards a person affected thereby, held properly excluded.—Webb v. Hayden, Mo., 65 S. W. Rep. 760.

180. WILLS—Executed During Period of Delirium Tremens.—A will, executed during attack of delirium tremens, will be maintained, if executed during a lucid interval.—Succession of Crouzeilles, La., 31 South. Rep. 64.

181. WILLS—Illicit Relation as Proof of Undue Influence.—An instruction, in a will contest case, that illicit relation with the principal beneficiary is a strong circumstance showing undue influence, held not erroneous.—Waters v. Reed, Mich., 88 N. W. Rep. 394.

182. WILLS—Oral Consent of Wife.—The wife's oral consent to the will at the time it was written is not binding on her.—Cook v. Lawson, Kan., 66 Pac. Rep. 1028.

183. WILLS—Rebutting Presumption of Undue Influence from Confidential Relations.—In order to rebut the presumptions of undue influence as to dispositions of property arising from confidential relations, the party seeking benefit thereof must show that the confidential relations were severed, and the other party had independent advice.—McQueen v. Wilson, Ala., 31 South. Rep. 94.

184. WILLS—Sufficiency of Attestation.—The signature of witnesses to a will will not constitute a sufficient attestation thereof, where the testatrix does not indicate to them in any way what the paper is.—Richardson v. Orth, Oreg., 66 Pac. Rep. 925.

185. WITNESSES—Conversation With Deceased Person.—A party is not rendered competent to testify as to conversation with person since deceased by the fact that a third person heard the conversation and testified as to it.—Payne v. Long, Ala., 31 South. Rep. 77.

186. WITNESSES—Husband and Wife.—Husband held competent witness in case, after his wife had been dismissed out of it.—Van Valkenburg v. Lynde, Kan., 66 Pac. Rep. 994.

187. WITNESSES—Mortgagor Incompetent to Testify as to Acts With Deceased Mortgagee.—Mortgagors held to be persons from, through, or under whom the mortgagee derives title, so as to be incompetent, under Code, § 4604, to testify as to transactions with a decedent.—Clinton Savings Bank v. Grohe, Iowa, 88 N. W. Rep. 357.

188. WITNESSES—Refreshing Memory.—Testimony of a police officer at a preliminary examination may be read to him on a criminal trial to refresh his memory. —People v. Joy, Cal., 66 Pac. Rep. 964.

189. WITNESSES—Surgeon's Testimony as to Character of Wound.—Under Code, § 4608, a surgeon was not precluded from testifying on a trial for murder that he was called to attend deceased, and found her suffering from wounds which he believed were received in an attempt to peform a criminal operation.—State v. Grimmell, Iowa, 88 N. W. Rep. 342.

190. WITNESSES—Testimony of Heirs as to Advancements.—Heirs held incompetent, under Code, § 4604, to testify that notes given by one of the heirs of the deceased were in advancement and not a debt.—Russell v. Smith, Iowa, 88 N. W. Rep. 361.

191. WORK AND LABOR—Services of Daughter to Mother.—To enable a daughter to recover from her mother's estate for services in caring for her mother, there must be sufficient evidence of at least an implied agreement for reimbursement, to overcome the presumption of gratuitious service. — Decker v. Kanous' Estate, Mich., 88 N. W. Rep. 398.